UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
18th meeting
held on
Wednesday, 26 October 1994
at 10 a.m.
New York

SUMMARY RECORD OF THE 18th MEETING

Chairman:	Mr. MADEJ (Vice-Chairman)	(Poland)
later:	Mr. LAMPTEY (Chairman)	(Ghana)

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Distr. GENERAL
A/C.6/49/SR.18
21 November 1994
ENGLISH
ORIGINAL: SPANISH

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In the absence of Mr. Lamptey (Ghana), Mr. Madej (Poland), Vice-Chairman, took the Chair.

The meeting was called to order at 10.20 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (*continued*) (A/49/10 and A/49/355)

1. Mr. BOS (Netherlands) said that the establishment of the International Tribunal on the former Yugoslavia and the proposal to establish one on Rwanda showed that the international community needed a permanent international criminal court. The International Law Commission was to be congratulated on the valuable work it had accomplished during its forty-sixth session on the draft statute for an international criminal court. While the draft submitted by the Commission was acceptable on the whole, he wished to draw attention to a number of points that he viewed as important.

2. The only sound legal basis for the establishment of the court was a multilateral treaty, since that was the only way in which States could decide freely whether they accepted the statute and the jurisdiction of the court. Among the procedures proposed, amendment of the Charter of the United Nations posed serious practical problems, General Assembly resolutions had the status of recommendations and were not binding, and Security Council resolutions could be binding if adopted under Chapter VII of the Charter which, as was well known, related to the maintenance and restoration of peace. Clearly, once the court was established, it should have a close relationship with the United Nations. On that point, the provisions of article 2 of the draft statute seemed to be acceptable.

3. With regard to the composition of the court, articles 4 and 6 struck a balance between the need for flexibility - the court would meet only to consider a case - and the need for continuity - the judges would be elected for a fixed term. However, the distinction between judges with criminal law experience and judges with recognized competence in international law was too rigid and categorical and could raise practical problems when an appeals chamber and one or more trial chambers were being constituted. Article 6, paragraph 6, which fixed the term of office of judges at nine years, as in the case of Judges of the International Court of Justice, should not be changed.

4. The court's jurisdiction should be confined to a very limited number of extremely serious crimes, since States would be willing only in exceptional cases to waive their sovereignty in the field of criminal law in favour of an international mechanism. Three criteria would have to be met for offences to fall within the court's jurisdiction *ratione materiae*: first, the offences would have to constitute a violation of fundamental humanitarian principles and outrage the conscience of mankind; secondly, they would have to be such that their prosecution would be more appropriate at the international than at the national level; and thirdly, it would have to be possible to hold one or more individuals personally responsible for the offences. Genocide, aggression,

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serious war crimes and systematic and large-scale violations of human rights would therefore come under the court's jurisdiction. That position was only partly reflected in the draft statute, inasmuch as article 20 (e) broadened the scope of jurisdiction ratione materiae beyond the limits of what seemed to be currently acceptable, encompassing crimes that could be sufficiently well addressed by applying the principle of aut dedere, aut iudicare.

5. The wording of article 21, which conferred on the court an inherent jurisdiction in respect of the crime of genocide, was sound. On the other hand, it was a retrograde step to propose the "opting in" system for the crimes referred to in articles 20 (b) and 20 (d), since those crimes were so serious that it should be impossible for States to accept the statute without accepting the jurisdiction of the court in such cases. Moreover, genocide and crimes against humanity related to the same acts, and it was very difficult to draw a dividing line between them.

6. With regard to article 23 of the draft statute, while paragraph 1 was acceptable, paragraph 2, which made the exercise of the jurisdiction of the court dependent on a determination by the Security Council that a State had committed an act of aggression, had to be rejected. The political question of whether a country had perpetrated such an act was in principle separate from the legal question of whether an individual from a particular country could be held responsible for the act. It should be noted that it was so exceptional for the Security Council to determine that a State had committed an act of aggression that the court could not easily overlook such a decision in a particular criminal case.

7. The role of the court had been presented as too flexible, and it might be more appropriate to opt for the system of preferential jurisdiction, particularly if its jurisdiction were to be limited to the crimes referred to in articles 20 (a) to 20 (d). In the event of conflicting jurisdictions, the court would then have priority in deciding whether or not to deal with a case. If it decided not to try a case, competence would revert to national judicial bodies.

8. The wording of article 25, paragraph 1, was appropriate inasmuch as it was based on the assumption that every State party to the statute that was also a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide would automatically accept the jurisdiction of the court. For other crimes, however, the text as it stood established that only the State that had custody of the suspect or the State in the territory of which the crime was committed could lodge a complaint. A broader approach would be preferable, for example allowing complaints to be lodged by States whose nationals had been victims of a crime, which had an interest in lodging a complaint and which were willing to do so. It therefore seemed more appropriate, given the seriousness of the crimes, to opt for a system similar to that proposed in the case of genocide, under which every State party to the statute would be competent to lodge a complaint with the court.

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9. The proposals regarding proceedings were, on the whole, acceptable. They should be kept as simple as possible, while satisfying the requirements for a fair trial.

10. Although the draft, as it stood, did not rule out the possibility of trials in absentia, the criteria applied were too narrow and arbitrary. The criterion used in article 44 (h) of the 1993 draft (A/48/10) seemed preferable. Needless to say, once the presence of the accused had been secured, the trial would have to be reopened to allow the accused to take advantage of all the rights guaranteed by universally recognized human rights instruments.

11. The Netherlands wished to question whether the exception to the principle of double jeopardy (non bis in idem) referred to in article 42, paragraph 2 (a), was correct. The application of the principle depended not so much on how a criminal act was characterized as on whether the act itself was the subject of renewed prosecution proceedings.

12. In line with the trend towards abolition that was reflected in several human rights instruments, the death penalty was not to be applied as a sanction.

13. The procedures established in article 44, paragraph 2, did not appear to be sufficient to deal with cases of perjury. It would be preferable to confer competence on the court itself in such cases.

14. Recent developments in the former Yugoslavia and in Rwanda illustrated the need to establish an international criminal court as soon as possible. The International Law Commission's draft provided a good basis for future discussions, and it was to be hoped that sufficient common ground could be established in the Sixth Committee to allow an international conference of plenipotentiaries to be convened for the purpose of studying the draft and concluding a convention on the establishment of such a court.

15. Mr. VILLAGRÁN KRAMER (Guatemala) congratulated Mr. Vereshchetin on his excellent presentation of the Commission's report. He also commended the Commission for its work on the draft statute for the international criminal court, which reflected a determination to produce a useful document on such a complex topic, leaving the road clearer than it had been when the question had first been approached 50 years previously.

16. He was prepared to support any measure adopted by the Sixth Committee to stimulate discussion and arrive at eventual approval of the draft statute, whether through a conference of plenipotentiaries or through the General Assembly. While that seemed to him to be the most appropriate route, he would support the formula that was considered the most rapid and practical. With regard to whether to establish the court by means of a treaty or by means of a General Assembly or Security Council resolution, he felt that the second option bore a double drawback in that it would not allow the court's competence to be as broad as had been proposed in the draft, and that it would deny the court sufficient means of action.

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17. With regard to the court's competence, the draft established a useful distinction between crimes under general international law, such as genocide, and crimes under international treaty law, which were those referred to in the provisions listed in the annex to the draft statute. The draft should elaborate the first category of crimes with an eye towards including cases distinct from genocide, such as piracy or torture. In other words, the decisive element would be the nature and scope of the act at the international level, so as to allow general international law to serve as the framework for an entire series of criminal acts. Nevertheless, that should not detract from the importance of the second category of crimes, namely those provided for under international treaty law, which would give the court competence over the majority of acts of terrorism.

18. With regard to the exercise of penal jurisdiction, the only case in which the court's competence needed to be restricted and be subject to a prior decision of the Security Council was that of aggression. When examining that question from a strictly legal point of view, the Commission had been unable to provide any other solution than that proposed in the draft. Although some delegations, for political reasons, had proposed to broaden the list to include war crimes, genocide, etc., the Commission's solution was the one justified from the strictly legal perspective. He was nevertheless prepared to give favourable consideration to such a broadening of the list.

19. Regarding the structure of the court, two levels of jurisdiction were recognized in the draft statute as proposed by the Commission, but the appeal was presented as a system of control of legality - a blend of appeal and annulment - a control that would be exercised over errors of fact and errors of law, and also over procedure and the submission of evidence (*error in processando* and *error judicando*). Such broad powers could certainly be granted to an appeals chamber, but in that case more precise rules of evidence than the current ones would have to be included in the statute. In particular, as was known, there were very delicate procedural questions, such as errors of law in the weighing of evidence, that presented real headaches for any jurist, whether judge or counsel. Those provisions of the statute would have to be refined for that reason.

20. With regard to the election of judges, he felt that in a double-hearing system, not only should the trial judges be chosen in their capacity as trial judges, but the appellate judges should also be chosen in their capacity as appellate judges. It should be the States parties to the statute that decided whom to elect, although within the framework of that useful distinction.

21. As for judicial guarantees, the Commission's emphasis on the principle of *nullum crimen*, *nulla poena sine lege* was praiseworthy. On the other hand, one had to be careful with the relationship between the principle of *non bis in idem* and the revision procedure. The draft statute proposed that the court itself could re-examine issues on which it had ruled at first instance. Nevertheless, the right of revision was always conceived of within the framework of new issues that the accused or the accuser made known to the tribunal. In a discussion of the substance of the statute, therefore, it was necessary to distinguish clearly

between the concept of res judicata, the right of revision and the principle of non bis in idem. Unless those subtle juridical distinctions were duly clarified, the statute would be difficult to apply.

22. Finally, with regard to the draft Code of Crimes against the Peace and Security of Mankind, he said that Guatemala had previously argued that it was necessary to preserve a close relationship between the international criminal court and the Code of Crimes. However, given the rapidity with which the draft statute for the court had been prepared, and the manner in which the draft Code was being prepared, it had reconsidered its position. His Government was no longer subordinating its support for the establishment of the court to the prior adoption of the Code. Nevertheless, when it was adopted, it would have to be included in the list of treaties in the annex to the draft statute for an international criminal court.

23. Mr. KIRSCH (Canada) congratulated Mr. Vereshchetin on his detailed presentation of the International Law Commission's report, which reflected appreciable progress in various spheres. He also welcomed the productivity of that body, which had completed its work on the draft statute for an international criminal court with significant improvements over the previous draft.

24. Establishing an international criminal court would expand current international law in a manner consistent with its evolution over the course of the twentieth century. Traditionally, public international law had focused on the rules governing relations between States and between each State and the international community. The desire for a superior body to govern those relations had resulted in the creation of the United Nations, of which the International Court of Justice was a part. International law had been adjusting to the needs of the international community and had more recently begun recognizing certain basic rights of individuals. The draft statute presented by the Commission constituted the logical next step: the creation of an international body able to rule on violations of fundamental rules of international law, recognizing in a concrete way that individuals also had duties in that sphere.

25. It was unfortunate and also ironic that there were so many examples of violations of international law. An international criminal court would serve two crucial purposes in that regard: first, the knowledge that the perpetrators of criminal acts would be prosecuted would serve as a deterrent factor; second, the prosecution of crimes against humanity would respond to the desire for justice on the part of victims of those offences. The international community could thereby contribute to maintaining peace and security by discouraging all reprisals or vengeance. The idea of an international criminal court had begun with the League of Nations and had been maintained in the United Nations for decades; what was new was that States had found the political will to establish a court of that kind, a proposal that Canada had always actively supported.

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26. His delegation had studied the draft statute with great interest in light of the comments it had presented on the earlier draft the previous year. He wished to make the following comments on the current version.

27. First, with regard to the establishment of the court, he supported the creation, by a treaty between States, of a permanent international criminal court which would complement national criminal justice systems and would sit as required. Such a court could only function effectively within an appropriate relationship with the United Nations, both for administrative purposes and to enhance its universality, authority and permanence. Canada had some concerns regarding the legal capacity of the court in the territory of each State party. For example, it could not accept direct enforcement of the orders of the court but instead would comply under mutual legal assistance arrangements as defined in international law.

28. Second, with respect to the court's jurisdiction, he believed that certain issues related to the crime of aggression would require further discussion if that crime was to be properly applied by domestic courts. For example, the relationship between the concept of aggression as currently defined in relation to a State and the notion of aggression applied to an individual as envisaged in the draft statute should be clarified. It would be appropriate, in paragraph 3 of the annex on crimes pursuant to treaties, to mention the Protocol to the Montreal Convention, namely, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, of 24 February 1988, which dealt with terrorist attacks in airports.

29. Third, with regard to matters of procedure, since the international criminal court would have available to it limited case-law and precedent in international criminal law, it was surely important, for the sake of consistency and for the purposes of appeal, to allow for dissenting decisions, particularly at the trial level. Then, if the appeals chamber was given the opportunity to review the case fully, looking at it from the perspectives of both the majority and the minority of the judges of the trial Chamber, it would have available to it all the arguments presented in the lower court. A related issue was whether the court would be bound by its own decisions, particularly at the appeal level. For the sake of consistency, it was important that, at the very least, the court should be bound by its appeal decisions.

30. Fourth, the number of issues which remained to be considered suggested that some time would be required for further discussion and reflection before a diplomatic conference could be convened. An effective approach would be to agree that a United Nations conference should be held some time in 1996. In addition, a preparatory committee should be established to allow States to make the changes in the draft statute that they considered necessary.

31. Mr. YAMADA (Japan) said that his Government did not question the need for measures to be taken at the international level to complement the traditional system of criminal justice based on national sovereignty. At the same time, however, in order for an international system to be effective, the consent of States was indispensable. The draft statute for an international criminal court

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submitted by the International Law Commission rightly made it clear that the proposed court would be complementary to national criminal justice systems. It stipulated that the court would be established by treaty and not by resolution of a United Nations organ, and it adopted in principle the "opt-in" system concerning the jurisdiction of the court.

32. In part 3 of the draft statute, the crimes enumerated in article 20 still needed to be more clearly defined, and article 23 required further study. In particular, he was concerned that article 23 (3) would, in effect, result in judicial proceedings becoming one of the political measures of the Security Council.

33. The desire to see an international criminal court established as soon as possible was quite understandable. However, in order for it to function properly and to be able to guarantee the rights of suspects and the accused, it was essential to lay down: first the substantive law, by specifying the type of act that constituted a crime and the nature and limits of the penalty imposed for that crime; second, the procedural law, by providing in detail for the procedures of investigation and public trial and establishing the rules of evidence; and, third, the court organization law, by specifying the required qualifications of judges, the procedures for disciplinary action against judges and the like. Since, under the international criminal court system, individuals would be prosecuted by the international community, special attention would have to be paid to the protection of the rights of the accused, for in most cases the accused would be tried by judges from different cultural backgrounds.

34. A number of aspects of the draft required work. With regard to substantive law, unless the constituent elements of crimes and the penalties to be imposed were clearly defined, the application of codified international law as criminal substantive law would contradict the principle of nullum crimen sine lege. The idea of applying national law at the level of international law to compensate for lacunae in substantive criminal law was worth considering, although the manner in which that was effected would require careful study. The wording of article 33 (c), which provided that the court should apply "to the extent applicable, any rule of national law" was too vague.

35. With regard to procedural law, the draft provisions were very general and far from adequate. For example, the draft lacked provisions on requirements for the issuance of a warrant, procedures for its execution, requirements for admissibility of evidence and the time period allowed for appealing the judgement. Moreover, the period of pre-trial detention, which should be the minimum, could be indefinite if approved by the presidency. Given that in many cases the crimes subject to prosecution by the court would be submitted in the context of political turmoil, there was reason to fear that the judicial procedure might be abused for political ends. Therefore, the adoption of safeguards, including the need to impose sanctions, should be considered. He believed that the procedural details must form part of the statute of the court rather than being dealt with in its rules.

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36. With regard to court organization law, the draft as it stood lacked provisions for preventing the misconduct of judges and other officials or providing recourse for those affected by such misconduct. Since provisions for impeachment of judges could not be included in the rules of the court, which were to be formulated by the judges themselves, such provisions would have to form part of the treaty.

37. In addition, the statute would have to be compatible with national judicial systems, which were subject to the constitutions of their respective States. In that context, it was inappropriate for the draft to recognize the inherent jurisdiction of the court in cases of genocide. The obligation of the States parties to submit evidence and to extradite criminals and the question of double jeopardy (non bis in idem) would need to be examined carefully in the context of the national legal systems.

38. It would be premature to convene a conference of plenipotentiaries before subjecting the current draft statute to detailed scrutiny at an informal consultation meeting, within the framework of the Sixth Committee, in which specialists in international law and in criminal law representing the legal systems of the world would participate. He suggested that the Committee should recommend a resolution to that effect to the General Assembly.

39. In conclusion, he said that it was essential to coordinate the draft code of crimes against the peace and security of mankind and the draft statute for an international criminal court, because both instruments contained provisions dealing with the same subject-matter. He suggested that the Special Rapporteur for the draft code should participate in the informal consultations on the draft statute.

40. Mr. BIØRN LIAN (Norway), speaking on behalf of the Nordic countries, said that those countries had confirmed their support for the adoption of a code of crimes against the peace and security of mankind but pointed out certain difficulties with respect to questions of principle as well as drafting. The International Law Commission should focus on the most serious crimes against the peace and security of mankind.

41. With reference to the draft statute for an international criminal court, he noted with satisfaction that the Commission had completed its work on the draft statute and supported the recommendation that the General Assembly should convene a diplomatic conference to conclude a convention on the establishment of an international criminal court. The text of article 2 of the Commission's draft failed to make sufficiently clear the relationship between the court and the United Nations. It was, however, a valuable basis for constructive discussions within the framework of a diplomatic conference. The time was ripe for the establishment of a permanent and global criminal court.

42. Mr. ZHANG Kening (China) said that the alarming increase in certain transnational and international criminal offences had given new urgency to the search for new forms of international cooperation in the legal domain. It was therefore conceivable that the establishment of an international criminal court

to supplement the existing system of universal jurisdiction would facilitate the prosecution of persons who had committed international crimes, particularly those offences that seriously endangered the fundamental interests of mankind and the international order. Nevertheless, given the complexity and sensitivity of the questions involved, his country had always considered that acceptance by States of the future international criminal court should be voluntary. Moreover, the proposed court should not replace or override systems of national criminal or universal jurisdiction: the relationship must be a complementary one. It was only on that basis that the court would receive universal acceptance and function effectively.

43. In general, the Commission's new text of the draft statute for an international criminal court was more balanced and realistic than the earlier one and could serve as the basis for negotiation. It was right that the court should be established by means of a treaty, not least because it would avoid the political and legal problems that might be inherent in other alternatives and would promote the universality of the court. On the question of the court's relationship to the United Nations, he supported the solution adopted in the draft statute since it avoided the problem of having to amend the Charter which would arise if the court were to be set up as a judicial body of the United Nations.

44. By clearly defining the subject-matter jurisdiction of the court, the statute had respected the nullum crimen sine lege principle.

45. The provisions concerning the modalities of State acceptance of jurisdiction conformed to the character of the court's jurisdiction and preserved States' freedom of choice to become parties to the statute or to accept the court's jurisdiction.

46. In general, the amendments that had been made to the earlier text were acceptable. He nevertheless had a number of suggestions for further improving it. The statute made jurisdiction subject to prior acceptance by States, except in cases of genocide, which fell under its inherent jurisdiction. In spite of the gravity of that crime, it must be asked whether the court should have compulsory jurisdiction in such cases. On the one hand, becoming a party to the Convention on the Prevention and Punishment of the Crime of Genocide did not automatically mean acceptance of international criminal jurisdiction. On the other hand, the proposed international criminal court would be established by treaty. It was therefore necessary to know how those provisions of the statute were to be reconciled with the provisions of relevant international treaties and with the character of the court. That was a matter that needed to be studied further.

47. Concerning action by the Security Council, there was still disagreement as to whether the premise serving as the basis for article 23 (1) of the statute, concerning the jurisdiction of the court in cases where a matter was referred to it by the Security Council under Chapter VII of the Charter, was a correct interpretation of the Charter. With respect to the creation of a tribunal to try persons who had committed crimes in the former Yugoslavia, some States had

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expressed reservations as to whether the Security Council was authorized to set up a compulsory jurisdiction. It was therefore dubious whether it was wise to base the statute on such a controversial assumption. It was also dubious whether that provision was compatible with the character and basis of the court. The statute should provide for the possibility that the Security Council might make use of the court in specific circumstances, but it should do so only in ways that were compatible with the character of the court and the principle of voluntary State acceptance of its competence and that would not compromise its independence as an international judicial body. It would probably be helpful to provide, in cases where the Security Council decided to make use of the court, for prior acceptance by the States concerned of its jurisdiction. It was to be hoped that extensive consultations would produce a generally acceptable solution.

48. The provisions concerning the subject-matter jurisdiction of the court had been improved and the definition of crimes under general international law was now clearer. However, some of the crimes listed in article 20 lacked the precise definition that was required in criminal law. Even in the case of crimes defined by treaties there was no unanimity of views as to whether those definitions met the requirement of precision. If, as had been indicated, the statute would not include definitions such as would be formulated in other instruments, it was clear that the drafting of definitions for use by the court required further study.

49. Article 42 concerning the non bis in idem principle should be clarified and improved. Given the possibility that its provisions might be interpreted as casting the international criminal court in the role of a higher court vis-à-vis the national courts, it needed to be amended to restrict its application to States which had accepted in advance the jurisdiction of the court.

50. The establishment of an international criminal court was undoubtedly a complex major undertaking of the international community in its fight against crime. It would therefore be necessary to ensure mutual assistance and cooperation between national criminal jurisdictions and the current criminal jurisdiction. China was ready to continue the exchange of views with other States in order to achieve a satisfactory outcome.

51. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that the International Law Commission had made substantial progress during the year by bringing to a conclusion its work on two very important subjects: the law of the non-navigational uses of international watercourses and the draft statute for an international criminal court. On the latter subject, he commented that the international community was fully convinced of the urgency of setting up such a court.

52. The urgency of the matter had been confirmed by the creation of special bodies, such as the International Tribunal for the former Yugoslavia and the recent recommendation that the jurisdiction of that Tribunal should be extended to acts committed in Rwanda (document S/1994/1125). The same degree of urgency should be attached to the code of crimes against the peace and security of

mankind, the provisions of which should be harmonized with those of the statute of the court.

53. Venezuela had always supported the establishment of an international criminal jurisdiction which would respond to the evolution of international relations and to the need to punish crimes against the peace and security of mankind. The Commission had prepared a balanced draft that provided an excellent basis for the analysis and finalization of a text by a preparatory committee to be set up prior to the convening, at the earliest possible date, of the conference of plenipotentiaries which would adopt the draft statute.

54. The court should be a permanent and autonomous body, as befitted a jurisdiction, although it should also be integrated into the United Nations system, as the Permanent Court had been at the time of the League of Nations. The way in which the court would be linked to the United Nations was closely related to the manner in which it was established. The statute was equivalent to the constitutive instrument of an international organization, in conformity with the provisions of article 20, paragraph 3, of the Vienna Convention on the Law of Treaties. Its entry into force should be based on a large number of ratifications, otherwise it would be necessary to amend the Charter of the United Nations, a procedure that might not prove very feasible.

55. With regard to part 2 of the draft statute, and in particular the election of the judges of the court, his delegation believed that a specific clause should be included incorporating the principle of equitable geographical representation, which had been the accepted practice of the United Nations. Another major issue was the financing of the court which, regardless of the manner in which it was established, should possess its own funds. Were the procedure proposed by Venezuela to be adopted, the statute should include a clause relating to the budget.

56. Before addressing a number of substantive issues, he underscored the desirability of establishing a preparatory committee to prepare and submit to the conference of plenipotentiaries provisions relating to the entry into force of the statute, general reservations relating to it, the settlement of disputes over its interpretation or implementation and the rules for its amendment.

57. As for substantive issues, there were two fundamental questions which deserved close attention: the jurisdiction of the Court and the applicable law. First of all, it was necessary to distinguish between the court's existence and acceptance of its jurisdiction, which should in any case be expressed in conformity with the relevant rules laid down in the text. The court's jurisdiction should necessarily be based on the consent of States.

58. The inherent jurisdiction conferred by article 23 in relation to action by the Security Council, under Chapter VII of the Charter, and to cases of genocide, was in keeping with the very nature of the court. However, the current wording of the article did not seem appropriate, as it made it possible for an international body to be subordinate to a political decision adopted by

an organ such as the Security Council, in which the right of veto of some States could impede the initiation of proceedings.

59. Only individuals could be tried by the court, whose jurisdiction was, moreover, exclusive. However, it was possible for the accused to be tried by the custodial State, by another State with which there was an extradition agreement, or by the court. States should have the option of handing accused persons over to the court or trying them in accordance with their own national law. In the case of nationals of the custodial State, he said that, should the situation arise in Venezuela, the most likely outcome would be for the suspect to be brought before the national jurisdiction, in accordance with Venezuelan law.

60. Another issue that required close analysis was that of the applicable substantive law. Treaty law and customary law should be regarded as the main sources of international criminal law. Secondary sources, such as international legal doctrine and jurisprudence, including the new sources of international law such as the resolutions of international organizations, should also be taken into account. However, the reference to national law (article 33 (c)) was inappropriate, as there was no reason for an international court to apply it.

61. Article 20 (e) specified the main sources and referred to an annex listing a number of international instruments which, in one way or another, were related to the crimes referred to in the statute and to applicable law. The court should be in a position to exercise its jurisdiction clearly. The wording of article 20 was clear, although a doubt remained - which should be dispelled as soon as possible - as to whether it was stating a principle or a rigid rule. Allowance should be made for the list of international crimes to be expanded so that the court could adapt to the constant changes taking place in the international arena. Thus, for example, terrorism and other crimes against mankind and against international peace and security, as well as drug trafficking, could come within the court's jurisdiction.

62. With regard to procedure, Venezuela believed that the rules set out in the draft statute should be spelt out more precisely when the time came to adopt the rules of the court.

63. Although the establishment of the court was a legal question, it was not possible to disregard either political factors and considerations or their consequences. The text finally adopted should be acceptable to all countries, in order to avoid the risk of establishing an ineffective institution.

64. Mr. Lamptey (Ghana) took the Chair.

65. Mr. CAFLISCH (Observer for Switzerland), referring to the draft statute for an international criminal court, said that Switzerland, which had always favoured the establishment of an international jurisdiction to prosecute those guilty of particularly serious crimes, could not but view the new version of the draft positively. A court such as that envisaged in the text would help to ensure respect for international humanitarian law, above all the 1949 Geneva

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Conventions and the 1977 Additional Protocols thereto, of which Switzerland was the depository.

66. Although Switzerland advocated the establishment of a permanent international criminal jurisdiction, it was not prepared for that to be achieved at any price. Such a jurisdiction, if it was established by a treaty, would offer guarantees of its effectiveness and efficiency, which would not be possible without the support of a large number of States. Failing that, both the instrument and the court would be a dead letter. Accordingly, Switzerland believed that the possible convening of a conference of plenipotentiaries to adopt the convention should be decided on the basis of that requirement.

67. Up to the present time, war crimes had been tried internationally by ad hoc tribunals, and, in recent years, within the framework of Security Council resolutions based on Chapter VII of the Charter. The establishment of a court should make it possible to replace those tribunals by a single judicial organ, thus checking the proliferation of new institutions in that sphere.

68. Subject to those two reservations, Switzerland was prepared to participate in multilateral negotiations leading to the preparation of a convention based on the draft of the International Law Commission.

69. The Swiss delegation would have preferred a more direct statement on the court's jurisdiction, i.e. that its jurisdiction with respect to the crimes listed in article 20, paragraphs (a) and (d), could be exercised without requiring from States parties the explicit acceptance provided for in article 22. However, that would not apply to the crimes prohibited by the treaties referred to in article 20, paragraph (e), and listed in the annex, where both explicit acceptance and the status of State party to the treaty in question seemed to be required.

70. Proceedings would be initiated (articles 21 and 23) on the basis of a complaint brought by a State which had accepted the court's jurisdiction with respect to a specific category of crimes. Such acceptance was not required in the case of genocide, but the complainant State must be a party to the future convention and to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Those rules raised two questions. Firstly, since genocide was punishable both under customary law and under the 1948 Convention, it was not reasonable that the right to bring a complaint should be limited to the States parties to the Convention. Secondly, it must also be asked whether the prosecutor should not have a right of initiating proceedings in such cases.

71. Article 37 contained the general requirement that the accused should be present during the trial. The Swiss Government supported that provision without reservation.

72. The issue of penalties was not satisfactorily resolved in article 47. Firstly, it did not seem logical to offer judges the alternative of imposing a sentence of life imprisonment or imprisonment for a specified number of years on the one hand, and a fine on the other. Nor was it right that crimes of the

seriousness of those dealt with in the draft statute could be punished by a mere fine or that a fine could be imposed but terms of imprisonment of months were excluded. Even more serious was the vagueness of article 47, which made a mockery of the requirement of nulla poena sine lege since it did not specify either the duration of the term of imprisonment or the amount of the fine. The expression "may have regard to" the penalties provided for by national law, which appeared in article 47, paragraph 2, was also extremely vague: on the one hand, it allowed the court not to take such laws into account; on the other hand, it allowed the court to choose from among several national legislations without offering any criteria for making the choice. The best solution, as in the precedent of the International Tribunal for the Former Yugoslavia, was to apply a single national legislation, that of the State in whose territory the crime had been committed. Another omission which must be made good was that the draft text said nothing about restitution of items which had come into the possession of the convicted person illegally.

73. Although according to article 26, paragraph 5, the presidency could request the prosecutor to review his decision not to initiate an investigation or not to file an indictment, it was not clear what would happen if the prosecutor stood by his decision. It seemed preferable to leave the decision entirely to the discretion of the prosecutor or to allow the parties concerned to appeal against it before a body fulfilling the function of an appeals chamber.

74. The non-mandatory language of article 45, paragraph 3, was unacceptable. A case which could not be decided by a trial chamber should not be retried by the same chamber; furthermore, it must be asked whether the failure to agree on a decision did not amount to acquittal. On the other hand, paragraph 5 was correct not to allow any dissenting or separate opinions in the decision, for they might erode the authority of the court. It must be pointed out that in the French text the word "opinion" should be replaced by "décision".

75. With regard to institutional issues, the solution provided in article 6, which divided the judges of the court into two categories, did not seem correct. States parties should have a degree of latitude in the election of judges; moreover, the proposed method complicated the election. With respect to paragraph 3, it seemed better to appoint 11 judges (three for each trial chamber and five for the appeals chamber), the solution adopted for the International Tribunal for the Former Yugoslavia, which also allowed for the financial situation of many States.

76. That same financial situation made it difficult to understand why article 19, paragraph 2, stipulated that the rules of the court should be submitted to a conference of States parties or why any amendments to the rules should be subject to the same procedure if the judges so decided. It seemed better to follow the example of the International Court of Justice and the International Tribunal for the Former Yugoslavia, which had drafted their rules without recourse to States or to the Security Council.

77. There were other questions which Switzerland would like to take up at a later stage in the Committee's work. However, it believed that the Commission's draft text constituted a solid basis for the future negotiations among States.

78. Mr. TANG CHENGYUANG (Asian-African Legal Consultative Committee) said that it was an honour to address the Sixth Committee. Initially the activities of the Asian-African Legal Consultative Committee (AALCC) had been focused on the formulation of legal rules and principles and the provision of advisory services to its member States. Since its acquisition of permanent observer status in the United Nations it had oriented its work programme so as to complement the activities of the United Nations in the progressive development and codification of international law; that had been done on several issues.

79. Following the formalization of links with the Committee, the AALCC secretariat had undertaken the preparation of notes and comments on the items on the agenda of the General Assembly which were designed to help the delegations of States members of the Consultative Committee to take an active part in the Assembly's proceedings. In 1994 the documents prepared by the secretariat dealt with such important issues as the elaboration of an international convention on the security of United Nations and associated personnel.

80. The cooperation between AALCC and the United Nations dated back to 1956 when AALCC, as a service for the Asian-African community, had undertaken a systematic review of the work of the International Law Commission. That review had become a permanent feature of its work programme. It was the normal practice for the Chairman of the Consultative Committee to attend the meetings of the Sixth Committee. At its thirty-third session, held in 1994 in Tokyo, AALCC had been honoured by the presence of the Chairman of the International Law Commission, Mr. Vereshchetin, who had given a lucid and succinct account of the progress of the work of the Commission at its forty-fifth session.

81. The items currently on the Commission's agenda were of particular interest to the States of Africa and Asia. The item on international watercourses was in the AALCC work programme, and at its thirty-third session the Consultative Committee had expressed its concern at the increasing number of instances of misuse of freshwater resources. It was important to create an effective mechanism for the peaceful settlement of disputes and for the promotion of subregional and regional cooperation in the non-navigational uses of international watercourses.

82. The Consultative Committee invited the Chairman of the Sixth Committee to attend its next meeting, which would be held in Qatar, and it reiterated its thanks for having been allowed to take part in the work of the Committee.

The meeting rose at 12.45 p.m.

UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
19th meeting
held on
Thursday, 27 October 1994
at 3 p.m.
New York

SUMMARY RECORD OF THE 19th MEETING

Chairman: Mr. LAMPTEY (Ghana)

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Distr. GENERAL
A/C.6/49/SR.19
4 November 1994

ORIGINAL: ENGLISH

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The meeting was called to order at 3.30 p.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION (*continued*) (A/49/10 and A/49/355)

1. Mr. RAO (India) said that recent international conflicts, particularly in the territories of the former Yugoslavia, had highlighted the need for the establishment of a permanent criminal court, and India complimented the International Law Commission (ILC) on its work in preparing and adopting the draft articles before the Committee (A/49/355). His delegation welcomed the general scheme of the draft statute, under which only individuals could be prosecuted, and then only upon a formal complaint by a State party. Provision had also been made for the Security Council to refer cases to the court; that power required further consideration, however, and should be approved only within the limits agreed to by consensus.

2. In his view, the most important part of the draft statute was its definition of jurisdiction and, in particular, the status of the crime of genocide. The provisions of article 22 enabled States to indicate the categories of crimes referred to in article 20 in respect of which they would accept the jurisdiction of the court. Under article 23, the court had *ipso jure* jurisdiction in respect of the crimes referred to in article 20, subject to the determination of the Security Council, and no complaints directly related to an act of aggression could be brought before the court unless the Security Council had first determined that the State had committed an act of aggression.

3. The draft statute had followed a balanced and careful approach and, by focusing on national criminal jurisdiction and requiring the consent of the States actually concerned with the alleged crime, had given priority to the establishment of an international criminal jurisdiction in principle only, leaving the prosecution of the case to the State's own consent regime.

4. The draft statute contained two novel provisions, namely: the special power conferred on the Security Council, acting its powers under Chapter VII of the Charter (article 23 (1)), to refer crimes to the court; and the power of any State party to refer the crime of genocide to the court for investigation (article 25 (1)) and trial (article 20 (a)). The latter power was not sanctioned either by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide or under general international law, and some members had argued that the provision represented a development of international law. While there was universal agreement on the need to deal firmly with the crime of genocide, it was questionable whether precedents in law should be created which totally ignored or even violated existing treaty arrangements: a possible solution was, therefore, to amend the Convention on genocide.

5. While the statute did not deal exhaustively with all matters, it contained provisions on all relevant aspects, including the jurisdiction of the court, investigation of alleged crimes, methods of seeking judicial assistance from States and the rights of the accused. Due emphasis had been placed on the

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consent regime of the States concerned as the basis for jurisdiction as well as on the principle of cooperation. In addition, the statute was inextricably linked with the draft Code of Crimes against the Peace and Security of Mankind currently under consideration by the International Law Commission, together with which it would form the basis for the establishment of a comprehensive international criminal justice system.

6. India believed that the draft articles required very careful consideration, and their adoption should not be rushed, particularly since the court would not in itself be effective in deterring serious crimes against international peace and security. A general debate on the issue should be pursued both within and outside the Organization before a formal decision could be taken on convening a conference of plenipotentiaries to adopt the statute.

7. Mr. STÁNCZYK (Poland) said that Poland had always supported the idea of a permanent mechanism for an international criminal jurisdiction, especially since so much energy was expended by the international community on the establishment of ad hoc mechanisms for the prosecution of those accused of international crimes, with a consequent risk of jurisprudential inconsistency. Before such a court became operational, however, certain complex issues remained to be resolved.

8. Poland fully supported the basic principles on which such a court would come into existence, sharing the general consensus that its legal basis should be a multilateral treaty, that its jurisdiction should complement national jurisdiction in criminal matters and that it should sit when and as required. In addition, his delegation believed the court should have a close relationship with the United Nations, to ensure that it performed its judicial functions with universality, authority and effectiveness. In considering the options suggested in the ILC report for that relationship, States should bear in mind, at the legal level, the court's competence stemming from the action of the Security Council reflected in article 23 of the draft statute and, at the practical level, the modalities of financial support for the court.

9. While the scheme proposed by the Commission in its 1994 report (A/49/10) was a considerable improvement on earlier proposals, the central issue of the admissibility of crimes under general international law into the scope of the court's jurisdiction remained unresolved and would have to be closely considered in future debates on the issue. In view of the Commission's continuing doubts concerning the applicability of general international law relating to the submission of cases of genocide, he reiterated Poland's support for the proposal in the 1992 ILC report limiting the subject-matter jurisdiction of the court to crimes defined in treaties in force.

10. He noted the growing support for the view that the court's jurisdiction over genocide should be treated apart from other crimes enumerated in article 20, indicating that a proper balance had been struck between the current willingness of States to accept compulsory jurisdiction, and the need to ensure that the court could have "inherent" jurisdiction, limited to a small - but most abhorrent - area of its subject-matter jurisdiction. Since the draft statute

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was not a source of substantive law, any criticism that article 41 failed to meet the requirements of nulla poena sine lege was invalid.

11. While it welcomed the modifications to article 37 and the formulation of the rule excluding trials in absentia as a principal rule, his delegation stressed the need for further consideration of paragraphs 4 and 5 of that article, to avoid any challenge based on international human rights instruments.

12. One solution to the problem faced by those States whose constitution had precedent over treaties, and which accordingly faced constraints in the adoption of the draft statute, was constitutional amendment. That remedy was neither simple nor universally available, however, and constitutional problems were therefore likely to cause such States to reject the statute, or at least to express reservations on it.

13. In view of the lack of consensus on the convening of an international conference of plenipotentiaries to adopt a convention, Poland believed that the sensible next step would be to establish an inter-sessional body, such as a preparatory committee, to consider various options in the provisions of the draft statute and, if possible, to make certain modifications. Provided that such a committee worked expeditiously and confined itself to building on the existing document, momentum would not be lost and the work could be finalized at a diplomatic conference in 1996.

14. Mr. BERMAN (United Kingdom) said that his Government gladly endorsed the two cardinal principles on the basis of which the Commission had operated in completing the draft, namely, that a permanent international criminal tribunal would have to be established by a treaty; and that the invocation of international jurisdiction should be a last resort when national jurisdiction was not or could not be effective. The essential purpose of an international criminal court was to fill a gap in the existing international order, not to undermine - and still less to displace - the primary responsibility of States to bring the perpetrators of the most serious offences to justice.

15. A point of major importance was the link between a new criminal court and the United Nations. There was no realistic prospect of bringing such a court within the Charter, as an organ of the United Nations as such. Besides, the United Nations already had a principal judicial organ, the International Court of Justice, and there should be no confusion between the two bodies, either in their role and functions or in their legal status. There was no doubt, however, that an international criminal court must have a relationship with the United Nations in order to lend it the authority it would need. The Committee would have to reflect on the various illustrative models offered by the Commission. For example, the court's judicial independence could not be compromised by making it subservient to a political body.

16. Consideration also needed to be given to the internal links between such a court and the United Nations at the functional level. One such link was the method of the court's financing. Three further internal links, all with the Security Council, and all having a direct connection either with the court's

jurisdiction or with the conduct of its judicial function, were established in article 23. Those issues were of fundamental importance both for the role and prerogatives of the Security Council under the Charter and for the preservation of the integrity of the judicial process.

17. Another set of issues related to resources - personal, material and financial. Experience with the International Tribunal for the former Yugoslavia, established under Security Council resolution 827 (1993), pointed to some problems in that regard and could suggest some solutions. Many questions were interconnected; for example, the demands on scarce resources for prosecutions and especially for investigations were dependent on the scope and reach of the court's jurisdiction. The Commission had made an ingenious proposal, in article 10, for the transition from a part-time to a full-time court if the need for its punitive function should turn out to be greater than the deterrent effect of its mere existence. However, major demands on resources came from investigation and prosecution (and subsequent punishment), not from adjudication as such. Governments were entitled to know what to expect; his delegation therefore hoped that a first attempt at budgetary estimating would be built into the preparatory process and that the secretariat would be tasked accordingly.

18. The United Kingdom supported the proposal that a process should be established for intensive inter-sessional consultations to prepare for decisions by the General Assembly regarding the convening of an international conference of plenipotentiaries. There seemed to be widespread agreement that some such process was needed; there should not be undue difficulty in finding a formula which would respect the wish of some for rapid results and the general feeling that issues remained to be discussed among Governments that were not within the remit of the Commission as a body of independent experts. A decision should be taken at the fiftieth session. That would also allow an opportunity to learn from the practical experience of the International Tribunal for the former Yugoslavia, and possibly of the tribunal to be established for Rwanda; his delegation hoped that representatives of those tribunals would be associated with the Committee's inter-sessional work.

19. His delegation remained unconvinced about what had been said in the Commission and in the Committee on the relationship between the draft Code of Crimes against the Peace and Security of Mankind and the international criminal court. It could not see any prospect of agreement being reached on a draft code or that the proper functioning of an international criminal court would depend on one.

20. Mr. RIDRUEJO (Spain) said that the establishment of an international criminal court was widely regarded by world public opinion as a vital ethical, legal and political necessity, not only because such a court would make it possible to remedy the consequences of international crimes but also because its mere existence would have a deterrent effect. The tragic events that were currently taking place in some regions of the world demonstrated that neither the principle of universal criminal jurisdiction embodied in some legislations nor the mechanisms of international judicial cooperation were sufficient to

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punish the perpetrators of international crimes. The international community could not be insensitive to the pernicious effects of that situation of impunity.

21. Spain continued to be in favour of the earliest possible establishment of an international criminal court and, in general, supported the draft statute. It fully agreed with article 4, whereby the court would be a permanent body, but meetings would be held only when necessary, and with article 17, whereby the judges would not be required to serve on a full-time basis. That flexible and cost-effective approach seemed the most appropriate for the early establishment of the court, without prejudice to the possibility of determining at a later stage that the judges would serve on a full-time basis, as envisaged in article 17, paragraph 4.

22. The question of relations between the court and the United Nations had not been resolved in a satisfactory manner. It was not sufficient to allow the President, with the approval of the States parties, to conclude an agreement establishing an appropriate relationship between the court and the United Nations (article 2). It must be expressly established that the court would act with the authority and representativity of the United Nations; that idea must be duly reflected in the preamble.

23. On the question of the jurisdiction of the court, his delegation still felt that the ideal would be for the court to have binding jurisdiction, and its preference was for a system of exclusion or "opting out". However, it was aware that the articles proposed by the Commission were more realistic because they would remove some of the obstacles in the way of the early establishment of the court. His delegation supported the provision contained in article 23, under which the Security Council, acting under Chapter VII of the Charter of the United Nations, could refer matters to the court. That assumed a situation, for which there were precedents, of imposed jurisdiction, or breakdown of the principle of voluntary jurisdiction.

24. On the question of trial in absentia, his delegation felt that article 37 contained a balanced formula which was much more elaborate than that proposed in the previous year. However, it was still dissatisfied with article 47, on applicable penalties, which, it felt, did not duly respect the principle of nulla poena sine previa lege laid down in article 15, paragraph 1, of the International Covenant on Civil and Political Rights. Although it was provided in article 47, paragraph 2, that in determining the length of a term of imprisonment, the court could have regard to the penalties provided for by national law, that stipulation did not exclude the possibility of imposing on the accused a penalty that was heavier than the one that was applicable at the time when the criminal offence was committed. The court must be required to refer to national law, in order to avoid that situation. In the previous year his delegation had made a specific proposal to that effect.

25. On the delicate problem of determining the necessary number of ratifications or accessions for the convention to enter into force and for such a court to be established, his delegation reiterated its opinion that an

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excessively low number of acceptances would deprive the court of the necessary representativity and authority to act on behalf of the international community, but that an excessively high number could cause undue delay in its establishment. A balanced solution would have to be found, perhaps in setting the number somewhere between one third and one quarter of the Member States of the United Nations.

26. On the question of convening an international conference of plenipotentiaries, his delegation believed that the evolution of events and the dynamics of world public opinion provided adequate momentum at the current session to convene such a conference, and that 1995, when the fiftieth anniversary of the United Nations would be celebrated, was the appropriate year to hold the conference. That would be an excellent contribution to the United Nations Decade of International Law. In order to allay the misgivings of some States, it should be noted that the commitments to be undertaken would be flexible, since the judges would not work full time and the jurisdiction of the court would not be binding; those factors would reduce expenses. However, if a significant number of delegations preferred to allow more time to consider the draft statute and ensure that there was sufficient agreement on it before convening the conference, his delegation would not oppose such an initiative, provided that the period of study had a reasonable time-limit and was motivated by a desire to establish the best possible international criminal court and not to delay and obstruct its establishment.

27. Mr. RAINERI (France) said that events had confirmed the tragic urgency of the matters under consideration. The International Tribunal for the Former Yugoslavia was certainly a precursor of a permanent international court. The International Tribunal would probably not have been established so rapidly if the Security Council had not be able to draw on the work of the International Law Commission. At the same time, some first lessons could be drawn. For example, article 19 of the draft statute under consideration (A/49/355), which provided that the Rules of Court should be submitted to a conference of States parties for approval, was greatly improved. The need for that provision was apparent from the case of the International Tribunal; States which had already adapted their domestic legislation to the establishment of that Tribunal or were currently doing so, like France, would have found difficulty in bringing their domestic law into line with rules of procedure which had already been changed several times since their adoption.

28. On the question of the establishment of the court, most members of the Commission had supported having recourse to a convention, and his delegation was pleased that the draft statute endorsed that solution. The drawbacks of that method could not be overlooked, but, in the current state of law, it was difficult to find an alternative for an institution that would be permanent in nature. Recourse to the General Assembly would not be satisfactory, since General Assembly resolutions did not impose binding legal obligations on States, and one resolution could be superseded by another. Thus, neither the authority of the institution, nor its durability, would be ensured. Other methods of establishment would be considerably more complex and the results would be uncertain.

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29. The links between the court and the United Nations were an essential aspect, to which more consideration needed to be given. A number of approaches had been developed by the Working Group which deserved further study; however, article 2, which provided that the President could conclude an agreement establishing an appropriate relationship between the court and the United Nations, covered all the options. The question could not be resolved finally at the current stage, since it was linked to the nature of the court, which was one of the most controversial aspects. The preamble referred both to "the most serious crimes of concern to the international community as a whole" and to cases of non-availability of national trial procedures. That proposal had some advantages, including that of limiting the jurisdiction of the court to certain types of the most serious crimes, although it would subsequently have to be determined what crimes were envisaged. The concept of "crimes of international concern" required some clarification. It would also have to be determined who would decide that national trial procedures were unavailable or ineffective, and whether the intervention of the court would be limited only to such situations. Additional work would be required on the draft statute to find a formulation that would be less ambiguous than a mere allusion in the preamble.

30. Turning to part 2 of the draft statute, he said that the election of two separate groups of judges on the basis of their professional qualifications was too rigid and would establish an unjustified system of quotas. Such a solution had no precedent among existing international courts.

31. The question of the jurisdiction ratione materiae of the court was extremely complex and merited a cautious approach. Article 20 of the draft statute established the jurisdiction of the court over certain crimes, such as genocide, which were universally condemned and over crimes of international concern. That latter category had not been precisely defined and required further consideration. In that connection, his delegation continued to find unsatisfactory the draft Code of Crimes against the Peace and Security of Mankind. New developments relating to the draft Code had not caused his Government to modify its basic position.

32. By combining in a single article (article 20) certain essential provisions pertaining to the jurisdiction of the court, the draft statute had gained in clarity and rigour compared to the 1993 version. His delegation also appreciated that all references to the peremptory rules of international law had been eliminated. It had emphasized in previous years the disadvantages of referring to unwritten sources of law as the basis for indictment.

33. Article 20, as it currently stood, had two flaws. First, the crimes referred to under that article were listed without any reference to the international instruments in which they were defined. The Statute of the International Tribunal for the former Yugoslavia had adopted a different approach which, while not a definitive solution, was more rigorous: it made reference to a specific instrument or defined certain crimes on the basis of treaty law. Specifying the exact nature of the crime was a fundamental element of criminal law and should be incorporated into article 20. Secondly, the reference in article 20 (b) to the crime of aggression might give rise to

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considerable difficulties: aggression was not defined under any treaty and, notwithstanding the views of the Working Group, it concerned States and Governments rather than individuals. Article 23 of the draft statute specified that the Security Council was the competent body to determine whether an act of aggression had been committed; yet, it was not clear how an act for which a State was responsible could be transformed into an act for which one or more individuals was responsible.

34. The list of crimes pursuant to treaties found in the annex, was too long and, in any case debateable. Giving the court such wide jurisdiction might, at least initially, undermine its ability to fulfil its functions at a time when crimes such as genocide and other serious violations of humanitarian law were going unpunished. In any event, the competence of the court was a subject on which it would be difficult to arrive at a consensus. For that reason, it was important to maintain the element of flexibility which permitted States to accept the jurisdiction of the court over all or part of the crimes referred to in its statute. His delegation was strongly in favour of such an "opting-in" system, as it was presented in the current version of the draft statute. In that connection, he recalled that even in the case of genocide, article 6 of the 1948 Geneva Convention provided for a choice between national courts and a criminal court, the jurisdiction of which would be limited to those States which had accepted it.

35. With regard to procedural issues, the new version of the statute had taken due account of the views of States and was consequently more clear and coherent than previous versions. Article 33 (Applicable law) had been transferred from part 3 to part 5. That did not, however, resolve all the problems arising from the text of article 33, which had not been modified. The article provided that the court should apply the statute, applicable treaties, and the principles and rules of general international law. Thus the court would be applying customary law of a too general and too imprecise nature for it to be applied systematically. If the purpose of the article was to set forth general principles of law in the area of criminal procedure, that should have been expressly stated. The mention in article 33 to rules of national law was important, according to the commentary, because some treaties which had been included in the annex explicitly envisaged that the crimes to which the treaty referred were none the less crimes under national law. If the purpose of the article was to emphasize the issue of double jeopardy, that should have been made more explicit.

36. Another important procedural issue pertained to the powers of the Procuracy. Like some members of the Commission, his country was not in favour of the system under which the Prosecutor was responsible for both the investigation and prosecution of an alleged crime.

37. His Government continued to endorse the possibility of contumacious judgements and welcomed the fact that it had been incorporated into article 37 of the statute. The article as a whole provided enough guarantees to reassure those States which were unfamiliar with the system of trials *in absentia*.

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38. The draft statute did not, on the whole, contain any irreparable defects. It was an excellent text which had the merit of proposing solutions to issues which had been the subject of extensive debate. The time had come to move forward and, in that connection, his Government endorsed the convening of a conference of plenipotentiaries and hoped that a decision in that respect would be taken at the current session of the General Assembly. However, if it appeared that there was inadequate support for the convention, it would be best to postpone the decision until the following year.

39. Mr. VAN BOHEMEN (New Zealand) said that his Government strongly endorsed the establishment of an international criminal court, which was vital for the effective suppression and prosecution of crimes of international concern. Recent atrocities had underscored the need for a universal judicial body to bring perpetrators of international crimes to justice.

40. It was ironic that at that very moment the Security Council, which had established the International Tribunal for the former Yugoslavia the previous year, was currently considering whether to establish a second ad hoc tribunal to deal with the serious crimes committed in Rwanda. The fact that the Security Council had taken steps to establish two ad hoc bodies of that nature was dramatic evidence that the international community wished to ensure that the perpetrators of serious international crimes were brought to justice. At the same time, establishing ad hoc tribunals was a difficult process and might give rise to inconsistencies in the elaboration and application of international criminal law. It would be far better for the international community to have recourse to a single international criminal court.

41. With the draft statute, the international community was able for the first time to appreciate fully the legal and political issues arising in connection with the establishment of an international criminal court. The International Law Commission had performed an invaluable service by clearing away many of the conceptual and procedural difficulties that had clouded earlier considerations of the subject. The draft statute, as it currently stood, represented on the whole a careful balance of the various interests of Member States.

42. Article 2 left open the issue of the specific nature of the relationship of the court to the United Nations. Such an approach had the merit of flexibility; however, it was ultimately unsatisfactory to leave that important question unresolved.

43. Article 6 was a great improvement on the earlier version. He welcomed the fact that the term of office for judges had been reduced from 12 to 9 years, thereby bringing the draft statute into line with equivalent provisions contained in the Statute of the International Court of Justice and in those of the ad hoc tribunals established or under consideration by the Security Council.

44. In respect of article 20, his Government welcomed the fact that torture had been added to the list of crimes pursuant to treaties, contained in the annex, and that serious violations of the laws and customs applicable in armed conflict had been added to the list of crimes within the jurisdiction of the court.

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45. With regard to article 22, his Government had earlier favoured the "opting-out" system for accepting jurisdiction as an approach which would lead to a solid and certain jurisdictional basis for the court. It did, however, concede that the currently proposed "opting-in" approach would at least have the advantage of encouraging a greater number of States to become parties to the statute.

46. With regard to article 37, his country had in the past been opposed to the possibility of trials in absentia. It welcomed the general rule set forth in article 37 (1) that the accused should be present during the trial. It would not comment on the rest of the article until it had had time for further consideration of that matter.

47. Generally speaking, there was need for further reflection before a convention on the establishment of an international criminal court could be finalized and adopted. His Government was in favour of the convening of a conference of plenipotentiaries for the purpose of elaborating and adopting such a convention and felt that a decision on that matter should be taken at the current session of the General Assembly.

48. In his view, the conference should be convened in 1996. It would also be advisable to set up a consultation process prior to the conference so that States could exchange views on the draft articles and, to the extent possible, eliminate any remaining areas of difficulty. Although still open to other ideas, his Government endorsed the suggestion that an ad hoc committee on the matter might meet between the forty-ninth and fiftieth sessions of the General Assembly.

49. The entire set of procedural questions should be resolved in a manner which would encourage consensus and ensure the greatest support possible for the establishment of an international criminal court.

50. Ms. SKRK (Slovenia) noted with satisfaction that in its work on the draft statute for an international criminal court, the Commission had taken into consideration comments made by her delegation, which had always supported the establishment of such a court. As it currently stood, the draft statute provided a sound basis for convening a diplomatic conference to finalize and adopt a convention. The establishment of a permanent criminal court would be a landmark in relations between States and an invaluable contribution to strengthening international cooperation in dealing with crimes of an international character, a step which was essential to international peace and security.

51. Slovenia favoured an agreement between the court and the United Nations along the lines of that envisaged for the International Tribunal of the Law of the Sea. That approach would obviate the need to amend the Charter and would best preserve the independence of the future court.

52. The preamble to the draft statute represented a significant improvement over the 1993 version. Particularly noteworthy was the third preambular

paragraph, which emphasized that the court was intended to be complementary, rather than superior, to national criminal justice systems.

53. Part 2 of the draft statute had also been improved. Her delegation endorsed the composition of the court, including the establishment of the Procuracy as an independent organ (article 12 (1)). However, in order to maintain its autonomy, the Procuracy should be governed by its own internal rules, rather than being subject to Staff Regulations being drawn up by the Prosecutor, as currently envisaged under paragraph 7 of article 12.

54. Part 3 was the core of the draft statute. Article 20, by dividing the crimes over which the court had jurisdiction into crimes under general international law and crimes pursuant to treaties, raised some questions that would require further consideration. For example, the fact that the four 1949 Geneva Conventions were listed in the annex under the heading of crimes pursuant to treaties might be misleading. In that regard, her delegation endorsed the position of the Secretary-General that the Conventions embodied the law applicable in armed conflict, which had clearly become part of international customary law. It was also unfortunate that crimes associated with domestic armed conflicts, which were notorious for their brutality and for violating the most basic humanitarian laws, had not been explicitly mentioned as falling within the jurisdiction of the court. It was noteworthy in that connection that under article 5 of its Statute, the International Tribunal for the former Yugoslavia had the power to prosecute persons responsible for crimes against humanity when committed in armed conflict, whether international or internal in character.

55. Her delegation welcomed the fact that, as it and others had proposed earlier, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had been incorporated into the list of treaties referred to in article 20 of the draft statute.

56. One of the innovations of the draft statute was that it gave the court inherent jurisdiction over the crime of genocide, based on article VI of the 1948 Convention on Genocide. The statute also introduced, in article 22, the "opting-in" system, under which States could accept the jurisdiction of the court in respect of the crimes referred to in article 20. Yet under such a system, a State which was party to the Convention on Genocide and which had ratified the statute of the court did not accept ipso facto its jurisdiction over the crime of genocide. Thus the statute remained ambiguous with regard to the court's "inherent" jurisdiction over the crime of genocide.

57. Her delegation considered that part 4, relating to investigation and prosecution, had been improved and provided a firm basis for the functioning of future international criminal proceedings, although some details remained to be fine-tuned. It also approved of the new rules on applicable law contained in draft article 33, which would ensure the preservation of the nullum crimen sine lege principle.

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58. The draft statute contained no provisions on statutory limitations or on their non-applicability. Yet if a permanent international criminal court was to become a reality, the court's jurisdiction *ratione temporis* would have to be determined in order to preserve the principle of legal safety. She reminded the committee that the crimes listed in anti-terrorist conventions, over which the court had jurisdiction, were outside the category of war crimes and crimes against humanity, for which the non-applicability of statutory limitations was prescribed by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and by the domestic criminal legislation of many States, including that of Slovenia. Naturally the court would have jurisdiction *ratione personae* over natural persons on the basis of their individual criminal responsibility, but no general rules on the matter had been formulated. That was a deficiency, given that the Statute of the International Tribunal for the former Yugoslavia contained provisions regarding personal jurisdiction and individual criminal responsibility, including the responsibility of government officials and responsibility for crimes committed by order of a superior.

59. The provisions regarding trials *in absentia* had been improved in the new draft: the proposed rules on trial in the presence of the accused and the rights of the accused (articles 37 and 41) were basically acceptable to her delegation. In Slovenia trials *in absentia* were permitted in exceptional circumstances, if the accused intentionally avoided standing trial and gave pre-trial testimony. It was not, however, permitted in the case of a juvenile perpetrator of a criminal act. She also noted that although her delegation was aware that a fundamental element of an efficient international judicial system was the ability to bring the accused to court, the Slovenian Constitution forbade the extradition of its citizens.

60. She noted with satisfaction that draft article 47 on applicable penalties had been improved by the addition of a provision for imprisonment for a specified number of years as well as for life imprisonment. In her country capital punishment was prohibited and the maximum term of imprisonment was 20 years. Lastly, her delegation shared the view that there was a need to establish a permanent international criminal court and that an international conference of plenipotentiaries should be convened.

61. Ms. FERNANDEZ (Argentina) expressed her delegation's satisfaction that the Commission had completed its work on two issues of great importance for her country, the law of the non-navigational uses of international watercourses and the establishment of an international criminal court, whose permanent establishment she considered essential as a complement to national efforts to punish the most serious crimes against humanity. The draft statute was a significant improvement on the earlier version.

62. Her delegation felt, however, that some major aspects of the draft statute required further reflection and discussion, including the court's jurisdiction in respect of the crime of aggression, the court's supervision of the rights of the accused at every stage of the trial and of those convicted at the enforcement of sentences stage, and the implementation of the court's decisions

in the territory of States. For that reason, Argentina believed that it was probably premature to call a conference of plenipotentiaries for 1995. In that year, a further period should be set aside for consideration of the matter by a preparatory committee for such a conference, which could then be held in 1996. As for the status of the court, Argentina considered that the most realistic approach would be to establish it through an international treaty. It would not, at least initially, be an organ of the United Nations, but closely linked with it.

63. Mr. GONZALEZ FELIX (Mexico) said that the forty-sixth session of the Commission had been particularly fruitful, as was shown by the significant advances made in considering various items on its agenda and its success in responding to the expectations of the international community. Thus, the draft statute for an international criminal court, which was balanced and realistic, took account of the concerns expressed at the forty-eighth General Assembly.

64. The example of the International Tribunal for the former Yugoslavia, and the proposal regarding a special tribunal for Rwanda, had shown the need for a permanent court to try those responsible for crimes against humanity, meeting the concerns and needs of the international community as a whole. The rule of law would not be best served by ad hoc mechanisms. The court must enjoy full legitimacy, and for that reason his delegation believed that it must be set up on the basis of an international treaty.

65. Three issues were of particular concern to his country: the court's relationship to the United Nations, its jurisdiction and the convening of a conference of plenipotentiaries. With regard to the first, he reiterated that his country favoured an organ that would be impartial and fully independent, although necessarily linked with the United Nations through a special cooperation and coordination agreement. His country found the formulation of draft article 2 acceptable; the relationship of the court to the United Nations should be modelled on that between the United Nations and the International Tribunal for the Law of the Sea. As for jurisdiction, his delegation shared Brazil's concern that the definition of the crimes to be tried by an international court was not sufficiently precise to guarantee full respect for the basic principles of criminal law, nullum crimen sine lege, nulla poena sine lege. Only crimes of undoubted gravity should fall within the court's jurisdiction. Moreover, its jurisdiction should be complementary to that of States, not a substitute. It should have jurisdiction only over serious crimes such as genocide, aggression and serious violations of the laws and customs applicable in armed conflict, on those occasions when an international court was seen as the best way of dealing with them.

66. It was a matter of priority to set up the court. An international conference of plenipotentiaries was required to ensure intense preparation of the draft statute. With its wide experience, the Committee should set up an open-ended working group to analyse and make recommendations on specific aspects of an international criminal court.

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67. Mr. ZHU (China) said that, in view of the seriousness of the international offences covered by the draft Code of Crimes against the Peace and Security of Mankind and the fact that the purpose of the proposed international criminal court was to strengthen international cooperation in dealing with such offences, the offences listed in the draft Code must be placed under the jurisdiction ratione materiae of the court. The Commission had rightly decided that a special mechanism should be set up to harmonize the statute for an international criminal court with the provisions of the draft Code.

68. The concrete proposals concerning the general part of the draft Code made by the Special Rapporteur on the basis of the written opinions of various countries seemed to the point and reasonable. A definition and enumeration of offences, for example, would make article 1 more acceptable. He also felt that deletion of article 4, as suggested by the Special Rapporteur, should be considered. Some complex legal and technical questions, however, needed further study, such as the concept of "attempt" in article 3. Differences also existed concerning the appropriateness of the provisions on the principle of non bis in idem, which might need to be brought into line with the statute of the international criminal court. He hoped that the Commission would study those issues fully at its next regular session.

69. Ms. KUPCHINA (Belarus) congratulated the Commission on its success in completing its work on the law of the non-navigational uses of international watercourses and on the draft statute of an international criminal court, the establishment of which Belarus warmly supported. Her country had made numerous representations in favour of such a court. Many of the draft statutes were an improvement on the earlier version, while others required further consideration and possible amendment. Belarus fully supported the sentiments of the preamble, which stated that such a court was intended to be complementary to national criminal justice systems and existing procedures for international cooperation in criminal matters and was not intended to exclude the existing jurisdiction of national courts.

70. She also welcomed part 1 of the draft statute, particularly article 2, providing for an agreement establishing an appropriate relationship between the court and the United Nations. Such an agreement should be approved by Member States, yet what procedure would be used to obtain such approval was unclear. It was desirable that it should be properly defined by the time the statute was adopted. In her country's view the court should, as stated in article 4, be a permanent institution, but acting only when required to consider a case.

71. Turning to part 2, she said that article 6 required further discussion, since the requirement for judges to have either criminal trial experience or recognized competence in international law would inevitably lead to the grading of judges, and difficulties were bound to arise, particularly if judges were challenged. She preferred the approach of article 13 of the Statute of the International Tribunal for the former Yugoslavia. Judges of the international court should meet requirements of experience in both criminal and international humanitarian law.

72. As others had stated, the core of the draft statute lay in part 3, dealing with the jurisdiction of the court. She welcomed the fact that the new draft article 20 listed the specific crimes with respect to which the court had jurisdiction. It was particularly to be welcomed that the court should have inherent jurisdiction over the crime of genocide. With regard to article 21, 1 (b), Belarus would have preferred to retain the provisions of article 24 of the 1993 draft statute, under which the court could exercise its jurisdiction if it was accepted by the State which had custody of the accused in the case of a given crime, apart from the exceptions indicated in draft article 23. She particularly supported paragraph 1 of that article, which allowed the Security Council to have recourse to the court as an alternative to establishing ad hoc tribunals.

73. With regard to part 4, her country questioned the appropriateness of providing, under article 29, for a person arrested to have the possibility of release on bail, given the gravity of the crimes concerned. As for part 5, she believed that article 33 (c), relating to the application of any rule of national law "to the extent applicable" needed to be worded more precisely. Similarly, the phrase "any interested State" in article 34 (a) was too vague. All States with jurisdiction in relation to a given crime should be able to challenge the jurisdiction of the court. With regard to draft article 37, she was glad to note the emphasis on the presence of the accused and on the exceptional nature of circumstances in which the trial could proceed in the absence of the accused. As for draft article 42, she stressed the need for more work on the wording of paragraph 2, particularly the phrases "ordinary crime" and "not diligently prosecuted".

74. Belarus shared the Commission's view that an international conference of plenipotentiaries should be convened to study the draft statute and to conclude a convention on establishing the court. Preparatory work was needed, however, during which the draft statute could be discussed, taking into account the conclusions of legal experts, and the financial aspects of the court could be examined. As many States as possible should naturally participate in formulating the convention if the court was to be an effective international body. Lastly, she expressed her country's support for the need to adopt the draft Code of Crimes against the Peace and Security of Mankind. Work on the draft Code should be concluded with the utmost speed.

75. Mr. SZENASI (Hungary) said that his delegation agreed with the priority accorded by the Commission to the elaboration of the draft statute for an international criminal court, which, it felt, would warn perpetrators of war crimes that they would be relentlessly prosecuted and severely punished.

76. Because the establishment of such a court would require changes in national legislation and legal practice, the question had given rise to much controversy. His delegation felt that the Commission had made the right decisions on the basic issues. His Government had emphasized, for example, that establishing the court on a consensual basis, hence by a treaty, was the only way to guarantee its legitimacy. His delegation also welcomed the decision to dispense with the

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term "tribunal" and use the term "court" for the entity as a whole, designating its particular organs by specific names.

77. There must be a close relationship between the court and the United Nations in order for the court to function effectively. With regard to substantive aspects, his delegation agreed that the Security Council should have the sole authority to submit complaints to the court, whose jurisdiction could not depend on the consent of an individual State or States. For political and administrative purposes, too, such a close relationship was essential.

78. As to the manner of establishing that relationship, his delegation preferred the conclusion of an agreement pursuant to article 2, as outlined in part B, I, of appendix III to the draft statute. The precedents mentioned there should be studied carefully and possibly taken into account during the finalization of the treaty.

79. Hungary agreed in general with the draft provisions on the composition and administration of the court, in particular those of article 6 concerning the election of judges. Further refinements were needed, however, regarding the administration of the court as a "semi-permanent" body. While accepting the compromise between a permanent and an ad hoc court reflected in article 4, Hungary was sensitive to the dangers to the stability and independence of a court established as a semi-permanent body. It therefore considered that more safeguards guaranteeing the independence of the court and its personnel might be required in the rules. It agreed, moreover, that those rules should be included in the treaty, not adopted by the judges.

80. The inclusion of a fifth category of crimes established under specified treaty provisions (article 20, (e) of the draft statute) was an important addition. His delegation generally agreed with the list of treaties given in the annex and with the explanation given in the related commentary as to why some treaties had not been included, but felt uneasy about the exclusion of a few important instruments, in particular the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol II Additional to the Geneva Conventions of 1949 and relating to the Protection of Victims of International Armed Conflicts. Despite the fact that they contained neither clauses dealing with grave crimes nor enforcement provisions, they were being increasingly considered as part of international humanitarian law. The list of applicable treaties should therefore be further examined, a process that might also result in the elimination of some treaties from the current list.

81. His delegation considered that more time for reflection was still required before a conference of plenipotentiaries could be convened. It supported the setting up of a preparatory committee or an ad hoc working group to make the necessary changes in the draft statute and submit proposals at the next session of the General Assembly on the convocation of such a conference. It also noted with satisfaction the progress made on the draft Code of Crimes Against the Peace and Security of Mankind.

AGENDA ITEM 108: PROGRAMME PLANNING

82. The CHAIRMAN informed the Committee that he had received a letter from the Chairman of the Fifth Committee, which stated that the Committee for Programme and Coordination had noted that a number of proposed revisions to the medium-term plan for the period 1992-1997 had not been presented to the relevant sectoral and/or functional bodies concerned. It had stressed the need for all proposed revisions to be submitted to the relevant Main Committees of the General Assembly. In that connection, it had invited the Chairmen of the Main Committees to ensure that their programme of work was organized in such a manner as to facilitate their consideration of the proposed revisions prior to the consideration of the item by the Fifth Committee. He requested the Chairman to arrange that the Committee's views on proposed revisions were communicated to the Fifth Committee as soon as possible. It appeared, however, from the report of the Committee for Programme and Coordination (A/49/16 (part II)) that no revisions had been proposed to the programmes of the medium-term plan which might be of relevance to the Sixth Committee, and he therefore suggested that he should inform the Chairman of the Fifth Committee that the Sixth Committee had no views to offer on the matter.

83. It was so decided.

The meeting rose at 6 p.m.

UNITED NATIONS
General Assembly
FORTY-NINTH SESSION
Official Records

SIXTH COMMITTEE
20th meeting
held on
Friday, 28 October 1994
at 10 a.m.
New York

SUMMARY RECORD OF THE 20th MEETING

Chairman: Mr. CHATURVEDI (India)

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AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued)

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Distr. GENERAL
A/C.6/49/SR.20
21 November 1994
ENGLISH
ORIGINAL: SPANISH

The meeting was called to order at 10.15 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10, A/49/355)

1. Mr. Yoon-Kyung OH (Republic of Korea) expressed his appreciation to the International Law Commission for the valuable work done during its forty-sixth session, praised its Chairman for his lucid introduction of the Commission's report, welcomed the completion of the draft statute for an international criminal court and paid special tribute to the Working Group on a Draft Statute for an International Criminal Court, which had done the drafting, and to its Chairman for their significant achievements.

2. In resolutions 47/33 and 48/31, the General Assembly had requested the Commission to give priority to the question of a draft statute for an international criminal court, reflecting the sense of the international community that the time had come for the acceptance of individual responsibility for international crimes and the establishment of a criminal court to deal with them. Blatant violations of international norms must no longer be allowed to go unpunished for lack of an effective tribunal. The draft statute offered a sound and balanced basis for further discussion and deserved thorough scrutiny by Member States.

3. Subject to giving the matter more detailed study, he wished to make the following comments: first, as to the establishment of the court, he favoured a body that would act when needed rather than a standing body. Although making it an organ of the United Nations would lend the court authority and legitimacy, that could give rise to a number of difficult legal problems. Thus, establishing the court by a multilateral treaty and linking it to the United Nations by a specific agreement was a flexible and practical approach that seemed preferable. As to the composition of the court, he did not see the point of making a rigid distinction between judges with criminal law experience and judges with competence in international law.

4. Secondly, turning to the jurisdiction of the court, he considered the new draft a definite improvement over the previous one in two ways: the provisions on jurisdiction had been simplified and clarified. Precision in the definition of a criminal court's jurisdiction was essential. The same applied to the principle of nullum crimen sine lege, which required specific definitions of crimes. While article 20 might not be sufficiently precise, the current formulation appeared to be adequate for further discussion, because the statute was primarily a procedural instrument.

5. Thirdly, as to the acceptance by States of the court's jurisdiction, he was pleased to note that the new draft adopted the "opting-in" system as a general rule. That system should not, however, frustrate the very purpose for which the court had been established, which was to bring criminals to justice. Consequently, two exceptions must be allowed to the requirement for acceptance:

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the matter of inherent jurisdiction over the crime of genocide and any case of recourse to the court initiated by the Security Council.

6. Fourthly, while the provisions regarding criminal proceedings had been improved in the new draft, some aspects remained problematic: for example, article 26 (5), which allowed the Presidency to review a decision of the Prosecutor not to initiate an investigation or not to file an indictment, could substantially undermine the independence of the Prosecutor; article 42 on the principle of non bis in idem provided that the principle was not applicable if the act in question had been characterized as an ordinary crime; and lastly, there was the omission of another important issue, the financing of the court.

7. The gross violations of basic human rights over the past few years in Bosnia, Rwanda and elsewhere had created a long-awaited momentum for the establishment of a permanent criminal court. The international community must not let slip that opportunity to create a mechanism to combat crimes of international concern. Thus the draft statute must gain as widespread support as possible if the prospective court was to be an effective body. It was important to seize the promising moment, but it was no less crucial to find common ground. Before a diplomatic conference was convened, time was needed for careful study of the draft and for States to hold intensive consultations, either in a preparatory conference or informally, in order to reach a consensus on pending issues.

8. Mr. KOTSEV (Bulgaria) commended the Chairman of the International Law Commission for his lucid presentation of its report and expressed appreciation for the substantial progress made at its forty-sixth session, in particular the final adoption of the draft statute for an international criminal court. He also thanked the other members of the Commission and the Secretariat staff for their dedication and professionalism.

9. By giving priority to consideration of the draft Code of Crimes against the Peace and Security of Mankind and more specifically to the expeditious completion of the draft statute for an international criminal court, the Commission had not only heeded the request of the General Assembly in resolution 48/31 but had also proven its ability to meet the urgent expectations of the international community. Bulgaria had always supported the proposal for the establishment of an international criminal mechanism with jurisdiction over the most serious violations of international law, and it reiterated its strong commitment to combating those crimes in all their forms. It was confident that the eventual creation of an international criminal court would be an efficient means of deterring the possible perpetrators of such crimes.

10. The current draft statute was a significant improvement over the previous one and was a flexible and well-balanced document that reconciled the need for an international criminal court and the respect for State sovereignty. Furthermore, it was in compliance with the principles of national criminal justice systems and with the international legal instruments in force in the field of criminal law. The premise that the court should be complementary to national criminal justice systems was a sound one, because that would facilitate

its acceptance by the various States and enhance effective suppression of the most serious crimes of international concern.

11. The draft was a good basis for negotiations with a view to achieving consensus. Nevertheless, some shortcomings should be pointed out, as well an area of disagreement, which were due to the complicated and sensitive nature of the subject. First, with regard to the establishment of the court, Bulgaria would prefer that to be done by means of a multilateral international treaty since that would give the court prestige as an objective and impartial institution. Furthermore, the relationship between the United Nations and the international criminal court should be established by a separate agreement, which should stipulate that the United Nations would assume the financing. His delegation found it acceptable that the court would function as a permanent judicial institution but would meet only when required to consider a case submitted to it. Regarding the election of the judges, there was too categorical a distinction between persons with criminal trial experience and persons with competence in international law, and it would be sufficient to require one or the other of those qualifications.

12. Secondly, on the complex issue of the jurisdiction of the court, Bulgaria supported the distinctions in new draft article 20, which provided for two categories of crimes subject to the jurisdiction of the court, namely, crimes under general international law and crimes established under treaties. For the rest, a more careful analysis had to be done of the crimes listed in the annex, since some of them could be better prosecuted through inter-State cooperation based on the principle of aut dedere aut judicare. Bulgaria also supported the idea of voluntary acceptance of the jurisdiction of the court, except in cases of "inherent jurisdiction" in relation to the crime of genocide or in instances where the Security Council submitted a case under Chapter VII of the Charter.

13. With regard to the system of acceptance by States of the jurisdiction of the court, Bulgaria had expressed the view at the previous session that it would be best for that jurisdiction to be compulsory for States parties to the statute. It nevertheless understood the pragmatic approach consisting of the "opting-in" system provided for in article 22.

14. On the subject of the law applicable by the court, there was no doubt that the sources of applicable law should be the Statute of the court, related agreements, the general principles of international law and, to some extent, the provisions of national law. The previous year, Bulgaria had maintained that the internal law of States should not serve as a source of applicable law even indirectly because, since crimes and penalties were defined differently in internal law, the result would be a violation of the principle of the equality of all before the court and before the law. That led to the question of subject-matter jurisdiction, which should be based on rules of international law that were well defined and generally accepted by the international community. The most appropriate international instrument for establishing the substantive basis in law required for the efficient functioning of the court was the draft Code of Crimes against the Peace and Security of Mankind. The Commission should expedite its work on the topic and define the different categories of the most

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serious crimes and related penalties; in that way the principle nullum crimen nulla poena sine lege would be observed.

15. Bulgaria, committed as it was to combating the most serious international crimes in all their forms, was in favour of the establishment of an effective international criminal court based on broad acceptance by States. Further efforts should be made to achieve a broad consensus and finalize the text of the draft statute. The most effective approach would be for the General Assembly to take speedy action by initiating the preparatory process and convening a diplomatic conference on the issue in the near future.

16. Mr. NATHAN (Israel) congratulated the Commission for the thorough and painstaking work accomplished in drawing up the draft statute for an international criminal court, a task fraught with highly intricate problems on account of the wide variety of legal systems of the States involved. It was assumed that at some future stage the statute might be linked to the code of crimes against the peace and security of mankind, of which it might form an integral part.

17. While acknowledging the important changes introduced in the draft under consideration, he wished to make some comments. With regard to the relationship of the court to the United Nations (article 2), the court should not necessarily be part of the United Nations system as a judicial organ. To ensure the greatest possible acceptance and effectiveness, a treaty commitment was essential. Likewise, the relationship between the United Nations and the court should be established by means of an agreement. Regarding the qualification and election of judges (article 6), he did not consider it an absolute requirement for all judges to have criminal trial experience, but it was essential that a majority of judges should have such experience, in particular in the trial chamber. He further suggested that provision should be made for the right of judges to resign, as provided for in the Statute of the International Court of Justice. With regard to the disqualification of judges (article 11, para. 3), the ground for requesting such disqualification should be specified. The procuracy (article 12) should be independent of the court and not an organ of the court. The wording: "The Procuracy is an independent organ of the Court" in article 12 seemed contradictory. The procuracy might be either "independent" or an "organ of the Court", but not both together.

18. On the question of privileges and immunities (article 16), the provision that judges would enjoy privileges and immunities while holding office even when the court was not in session appeared far-reaching in comparison with Article 19 of the Statute of the International Court of Justice. Referring to the rules of the court (article 19), he did not deny the special importance of rules of evidence in a criminal trial, but did not think that such rules should be specified in the statute itself. On the other hand, the rules laid down in article 41, paragraph 1 (g) and in article 44 might usefully be amplified by including some of the basic rules of evidence.

19. The crimes within the jurisdiction of the court should be of a particularly heinous character, should be of international concern and should lend themselves

to precise definition. They should be universally accepted to be criminal acts and, in the case of treaty crimes, the treaties should have secured the widest acceptance by the international community.

20. Under article 20, a distinction was made in the draft between two categories of crimes, subparagraphs (a) to (d) dealing with crimes under general international law, and subparagraph (e) dealing with "treaty crimes". Article 20 should have expressly included the term "terrorism" on the ground that, with reference to an enumeration of specific criminal acts directed against the civilian population, the offence of terrorism met all the necessary requirements for inclusion and was recognized as an offence under international law. In subparagraph (c), the term "serious violations" of the laws and customs applicable in armed conflict was not sufficiently clear, and subparagraph (e) provided for a limitation of the court's jurisdiction in regard to the treaty offences listed; while such a limitation might be necessary in order to ensure that the court would be seized only of exceptionally serious offences, it might give rise to serious problems of interpretation and application.

21. The list of crimes pursuant to treaties contained in the annex to the statute should not, at least for the time being, include Protocol I Additional to the Geneva Conventions because, unlike the Conventions, it did not meet the requirement of widespread, if not almost universal acceptance. On the other hand, he agreed to the suggestion by the representative of Canada to include the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, supplementary to the 1971 Montreal Convention.

22. In article 21 (b), a further requirement should have been acceptance by the State of the accused's nationality. With reference to article 22, he supported the opting-in procedure for accepting the court's jurisdiction, but he had reservations concerning the provisions of article 23, because the Security Council was a political body and should on no account be involved in the prosecution of individuals. In fact, if it were the first organ to determine that an act of aggression which was the subject of the complaint had been committed, its decision might prejudice the ultimate finding of the court. It would therefore be preferable to delete the article.

23. In the matter of prosecution, under article 27, the prosecutor should be authorized to amend the indictment upon leave by the presidency. The far-reaching exceptions contained in article 37 to the principle that the accused should be present during the trial should be restricted. With regard to article 38, he suggested that the accused should be allowed to plead that the indictment did not disclose an offence under the statute, to request further particulars regarding the indictment and to plead for an amendment of the indictment.

24. Article 39 (a) should be more specific and should provide that the act or omission constituted a crime under article 20, which implied that it also constituted a crime under international law. The latter part of subparagraph (b) should be reworded to read "unless the act or omission

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constituted a crime under the relevant treaty at the time the act or omission occurred".

25. Referring to article 41 (g), he pointed out that under Israeli law the accused enjoyed the right of silence and the right to refrain from giving evidence, but that such silence might be interpreted as adding to the weight of evidence for the prosecution and providing corroboration of such evidence where such corroboration was required. Regarding evidence, he suggested that a paragraph should be added to article 44, reading: "Other rules of evidence shall be made under the rules of evidence to be included in the Rules of Court made under article 19". Paragraph 3 should contain a provision that the ruling in question should be given after hearing the parties or their representatives.

26. Article 45, paragraph 1, dealing with quorum and judgement, should provide for all members of the trial chamber to be present at all stages of the trial, in which case paragraph 3 could be deleted because all trial chambers would then be composed of an uneven number of judges. In addition, paragraph 5 should provide for the possibility of dissenting judgements. With regard to article 47, dealing with penalties, there should be the utmost certainty regarding the applicable penalty and the accused should be sentenced in the first place in accordance with the rules obtaining in the State in which the crime was committed and where the accused should have been brought to justice.

27. With regard to article 49, his delegation considered that, subject to article 50, paragraph 3, and save in cases where evidence was wrongfully excluded by the trial chamber, the appeals chamber should not hear evidence. A provision should be added in subparagraphs (a) and (b) empowering the appeals chamber to remit the case to the trial chamber with such instructions as it deemed fit, including the hearing of new evidence and the issuance of a new judgement.

28. Turning to article 51, he said that the court should have the power to demand the temporary transfer of a witness for purposes of confrontation and adduction of evidence, with the necessary provision for subsistence, travel expenses, and so forth.

29. Lastly, he suggested with regard to article 53 that the accused should be given the right to challenge the warrant for arrest and transfer in the manner and in accordance with the procedures generally provided for under extradition conventions and that there should also be provision for release on bail, pending transfer. Paragraph 4 of the article raised the question of giving priority to a request from the court over those from requesting States under existing extradition agreements. He suggested that the requested State be given an option in that context.

30. Mr. CHIMIMBA (Malawi) endorsed the purposes of the draft statute for an international criminal court and considered that the text prepared by the Commission was a balanced one. However, the preamble raised a number of fundamental questions concerning inter-State relationships and the relationship between the State and the individual, which would have to be addressed before

the international conference of plenipotentiaries was convened to adopt the statute. The legal implications of the establishment of the court for the development of international law would have to be assessed and the role of the court in the international legal order envisioned.

31. The establishment of an international criminal court severely tested the principle of sovereignty in contemporary international law and it would be necessary to ascertain whether a proper balance had been achieved. When temporary tribunals of that kind had been established to investigate very serious events, had the reasons adduced been more fundamental than the mere choice between a permanent and a temporary institution? And what impact would a permanent court have on international relations?

32. With regard to crimes for which the court would have jurisdiction, it was perhaps appropriate to draw a distinction between "individual" and "system" criminality, in other words between crimes committed for selfish reasons and those committed on a large scale with the encouragement or acquiescence of the authorities. Some of the treaties that had been listed in the annex regulated or prohibited conduct only on an inter-State basis and were therefore likely to raise problems connected with the different ways in which States perceived the relationship between municipal and international law.

33. Although the draft statute contained guarantees for the accused, it was not clear whether the question of the fairness of the whole system had been fully addressed. For example, would it be fair to transfer the accused from a national to an international jurisdiction, particularly where the latter institution was permanent? There were human rights considerations that raised the question of whether a proper balance had been achieved.

34. The relationship between the court and the United Nations was another issue that required deliberation. The possibility of a reform of the Organization, which would probably involve the amendment of the Charter, was currently being discussed. It did not therefore seem far-fetched to propose that the court should be one of the principal organs of the Organization, so that the question would form part of the package of proposed reforms. In conclusion, he said that he was not in favour of the immediate convening of an international conference but would prefer to see the issues raised by the adoption of the statute addressed in a preparatory process, which could also be linked to the activities of the United Nations Decade of International Law.

35. Mr. HILGER (Germany) said that events in recent years had shown that there were circumstances in which States were unable to prosecute criminals and, where appropriate, convict them. The large number of regional conflicts in which international humanitarian law and human rights were seriously violated indicated that there was an urgent need to take practical steps to achieve a form of universal criminal jurisdiction. Germany had therefore been gratified when the Security Council had adopted the resolution establishing an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia and, aware of its obligations in that regard, had prepared a bill,

recently submitted to the legislative bodies, designed to place cooperation with the tribunal on a firm foundation.

36. The draft statute prepared by the Commission was a welcome approach to the creation of a permanent international criminal court, which would have to be established by a treaty. From a substantive point of view, the treaty should preferably form part of the Charter of the United Nations but in view of the ensuing difficulties it would probably be necessary to opt for a multilateral treaty. A key question was how the court could be linked to the United Nations and it had been envisaged in that connection that the Security Council should be in a position to refer matters to it. A further question requiring close examination was the court's administrative and financial integration into the United Nations system.

37. Under the Commission's draft statute, States that became parties to the treaty would accept ipso jure the court's jurisdiction in respect of the crime of genocide. That ex officio jurisdiction should be extended inasmuch as the system of declarations of acceptance could lead to the court exercising no or very few practical functions because there were an insufficient number of declarations, even though a sufficient number of States had agreed to its establishment.

38. Some points called for reflection. The fact that article 12 provided for the complete independence of the office of the prosecutor gave cause for concern. To ensure the adequate representation of the international community's interests in the international criminal court, the activities of the prosecutor should be linked to the decisions of an organ of the United Nations in a way yet to be specified. The rules of the court also called for further reflection: regulations regarding the conduct of investigations and of the trial, particularly the taking of evidence, should be laid down in the statute itself. In addition, the fact that article 20 referred to various categories of offences without specifying their constituent facts or elements raised doubts with regard to the principle of clarity and definiteness, which must be respected in criminal law. As it stood, article 20 did not comply with the principle that an offence could only be punished if criminal liability had been determined before the act was committed. That shortcoming should be redressed, inter alia in the light of the corresponding provisions of the Statute of the International Tribunal for the former Yugoslavia. Article 28 was far from satisfactory: the statute should set forth unambiguous conditions for the arrest of suspects and ensure that they were brought before the competent judge within a short time.

39. As far as the accused was concerned, the rights set forth in article 41 ought in principle to suffice, but regulations on legal assistance, particularly for cases in which the court had to assign defence counsel, should be added. With regard to sentencing (article 46), it should be made clear that the essential basis was the offender's guilt, while the individual circumstances of the convicted person and the gravity of the crime played only a supplementary role. Lastly, the lack of a specific range of punishments in the statute was a matter of concern. The wording of article 46 (2) would be acceptable, however,

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if the words "the court may have regard to" were replaced by "the court must have regard to".

40. In general, the draft was an excellent basis for codification. It would therefore be a good idea to convene an international conference, provided that it was carefully prepared, to discuss the draft Statute in detail with a view to concluding a convention.

41. Mr. KARAM (Egypt), referring to the draft statute for an international criminal court, said that the need for a permanent organ of that character had first been felt some 50 years earlier, at the end of the Second World War. That need was becoming increasingly urgent with the daily witnessing of horrendous crimes. While some favourable developments had marked international relations in recent years, including the ending of the cold war and the establishment of *détente* between East and West, it currently appeared that those favourable developments had had adverse effects at the regional and subregional levels, where conflicts were intensifying, civil wars abounded and criminality and instances of rape, genocide and "ethnic cleansing" were on the increase.

42. The United Nations had responded to that situation by establishing ad hoc tribunals to try separately the breaches of international humanitarian law, including the International Tribunal for the former Yugoslavia, whose jurisdiction it was considering extending to cover the atrocities committed in Rwanda. Establishing ad hoc tribunals meant devoting time and considerable effort to concluding the relevant agreements. His delegation considered, therefore, that a permanent court would be an appropriate judicial organ to try individuals accused of committing serious international crimes and that, if it was a sole source of authority, the court would be able to avoid the risk of conflicting decisions that could rob judgements of some of their legal force.

43. As far as the draft statute was concerned, the best option would be to establish the court's relationship to the United Nations by means of a convention along the lines of that to be concluded between the United Nations and the International Tribunal for the Law of the Sea. The other methods proposed would give rise to serious difficulties. First, the idea that the court should be regarded as the principal judicial organ of the United Nations conflicted with Article 1 of the Statute of the International Court of Justice and would involve amending both the Statute and the Charter of the United Nations. The second variant, namely, making the future court a subsidiary organ of the International Court of Justice, had little chance of being accepted, given the differences of nature and jurisdiction between the two courts, which militated against a hierarchical relationship.

44. As to the proposal that the relationship to the United Nations should be established by a resolution of the General Assembly, he said that that method had already been followed in the application of a number of international conventions. In that regard, he cited the cases of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. The situations involved, however, were radically different: by virtue of its status and the nature of its functions, the court must command a high degree of independence

but did not require a large secretariat department to process the cases submitted to it.

45. It would be advisable to redraft paragraph 2 (a) and paragraph 3 of article 42. While establishing the new international criminal system would doubtless lead to greater efficiency and integrity, such a result could not be achieved without the cooperation of the national courts, whose justice the international court must supplement, without taking over their functions or disregarding their judgements or decisions.

46. Article 23 (1) should also be reconsidered, since a reading of it and of article 23 (3) gave rise to some ambiguity in the light of the rights of States referred to in article 21. If the court wished to keep its credibility intact, the exercise of its jurisdiction must be devoid of any political orientation and of the pressure of international relations. In general, there was nothing wrong in empowering the Security Council to refer particular cases to the court, but such referral must be without prejudice to a State's entitlement to accept the jurisdiction of the court. Accordingly, increasing the range of matters which the Council was authorized to refer to the court did not seem necessary. It might well be advisable to restrict that authorization to cases of aggression which seemed to the Council to pose a threat to international peace and security. There could conceivably even be cases in which the court decided to waive its jurisdiction on the ground that the international conventions referred to in the statute and the annex had not been breached or that a Security Council decision to refer a matter to the court had actually been made on the basis of political pressure even though the Council had given the maintenance of international peace and security as the reason.

47. In spite of those general observations and of other comments that he would make in due course, he regarded the draft statute as a good basis for future negotiations and endorsed the Commission's recommendation that the General Assembly should convene a cumulative plenipotentiary conference. That conference should be held in 1995.

48. Mr. MOMTAZ (Islamic Republic of Iran) said that the question of the legal nature of the association linking the international criminal court to the United Nations was of fundamental importance. Not only would that association safeguard the court's character and moral authority, it would also permit the court, under certain circumstances, to use the services of the United Nations, as provided for in article 2 of the draft. Under that article, the court would be able to conclude an agreement bringing it into relationship with the United Nations, in accordance with Article 57 of the Charter, such agreement to be submitted under Article 62 of the Charter to the General Assembly for approval.

49. The subject-matter of article 3 (3) and article 4 (2) should be dealt with in a separate article entitled "Legal capacity of the court", since any reference to that question in article 3, on the seat of the court, seemed out of place. In article 3 (3), the term "protocol" would be preferable to "agreement".

50. Article 6 (1) made a distinction that seemed unduly rigid. It would be enough to require future judges to meet one of the two requirements.

51. His delegation maintained the reservations it had expressed in 1993 with regard to article 15 of the draft. It preferred the formula used in Article 18 of the Statute of the International Court of Justice, primarily because it was general and did not refer to specific cases, which were bound to be very rare. In addition, the unanimity rule provided sounder guarantees than the rule of a two-thirds majority referred to in article 15 (2), because it would be conducive to the greater independence of the office of judge.

52. Article 20 of the draft statute, one of its most important provisions, presented some problems. For example, the term "grave breaches" used in the four Geneva Conventions and Additional Protocol I of 1977 applied, in reality, to all the cases listed in article 20 (c). Those instruments, especially the four Geneva Conventions, unquestionably constituted the expression of a well-established international custom and, because of the large number of States that had ratified them, were on the same level as the Convention on the Prevention and Punishment of the Crime of Genocide, although they were not accorded the same moral and legal authority. The reference to specific crimes in article 20 seemed highly judicious, inasmuch as it would facilitate the exercise of the court's jurisdiction in various highly specific instances. It seemed to be an unjustifiable omission that article 20 of the draft statute made no mention of the crime of apartheid on the same grounds as genocide.

53. Article 21 should be completed by a provision on acceptance of the court's jurisdiction by the State of which the accused was a national, since nationality represented a specific significant link for purposes of loyalty and jurisdiction. Paragraph 2 of article 21 dealt with that question partially, since, in many cases, the State requesting the surrender of a suspect would be the State of which the accused was a national.

54. Paragraphs 1 and 2 of article 23 had an excellent basis. Unquestionably, under Article 39 of the Charter, only the Security Council could determine the existence of an act of aggression. It also determined the existence of threats to the peace and breaches of the peace, but did not have a monopoly on the consideration of the situations arising therefrom. The jurisdiction of the court would be excessively limited if it was barred from trying suspects while the Security Council was considering such situations. Furthermore, in recent years the Security Council had tended to interpret the notion of "threat to the peace" increasingly broadly and had managed to extend it to cover practically all situations liable to give rise to the crimes categorized in the statute. It did not seem logical to impede the operation of the machinery provided for in the statute on the basis of political statements made in other forums. Consequently, paragraph 3 of article 23 should be deleted.

55. Although the Working Group on a draft statute for an international criminal court had endeavoured to combine the elements of distinct legal traditions in one coherent whole, it appeared that articles 37 and 47 of the text were based on a particular criminal system. Article 37 made provision, in exceptional

cases, for judgement by default. It was curious to note that paragraph 2 (c) permitted trial _in absentia_ if the accused had escaped from lawful custody or had broken bail, whereas the court was not afforded such possibility if the accused had never been arrested. It was not clear what the reasons for that distinction were, or its consequences. While the need to respect the principle enshrined in article 14 of the International Covenant on Civil and Political Rights that the accused must be "tried in his presence" must be recognized, it might be in the interest of the international community for the court to conduct a trial by default and to make known some of the facts to world public opinion; it could at least identify the perpetrators of heinous crimes and thus outlaw them. Moreover, in order to avoid contradictions with the Covenant, it might be possible in such cases not to apply automatically the sentence pronounced by default and to await the appearance of the accused before the court and a revised verdict.

56. Article 47 failed to take into account the fact that many criminal systems continued to impose the death penalty on the perpetrators of the most heinous crimes, in particular those mentioned in the draft statute. The option of determining the length of a term of imprisonment or the amount of a fine should be extended to determination of the penalty generally.

57. The jurisdiction of the court should be limited to the punishment of the most serious crimes of an international character, and the statement of acceptance did not necessarily entail the loss of jurisdiction by domestic courts. On the contrary, the court should assist domestic courts in cases where trial of the accused was difficult or impossible. He hoped that the draft Statute could be considered in the near future at a conference of plenipotentiaries and that the international criminal court would finally become a reality.

58. _Mrs. des ILES_ (Trinidad and Tobago), speaking on behalf of the States members of the Caribbean Community (CARICOM), said that the draft statute for an international criminal court was a balanced instrument offering a number of compromise formulations on fundamental issues, which should facilitate the widest possible acceptance by Member States. As envisaged in article 2 of the draft statute, the court should be established by a multilateral treaty, with a relationship agreement with the United Nations.

59. The jurisdiction of the court should be limited to serious crimes of international concern. The distinction was correctly drawn in article 20 between two categories of crimes: crimes under general international law and crimes under or pursuant to certain treaties listed in the annex to the statute. The court's jurisdiction should be complementary to domestic criminal justice systems. In 1989, when Trinidad and Tobago, with the support of CARICOM members, had reintroduced in the Sixth Committee the idea of the establishment of an international criminal court, it had stated that the establishment of an international criminal court would present to Governments a third option where trial in domestic courts and extradition proved impossible. Such serious crimes as large-scale drug trafficking and the activities associated with it, for

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example, money-laundering and acts of terrorism, must be dealt with through an international mechanism.

60. The wording of article 22, which provided that jurisdiction over certain crimes should not be conferred automatically on the court when a State became a party to the statute, was correct. While the "opting-out" system might appear more desirable in principle, it was recognized that an "opting-in" system was more likely to facilitate greater universality of participation in the court.

61. The provisions of Part 4 were generally satisfactory. Resort to the court should be limited to States parties. It was also of fundamental importance that, during the preliminary phase of an investigation, a person suspected of an offence should have all his rights guaranteed, as was provided for in the International Covenant on Civil and Political Rights. The wording of article 32, together with the provisions of article 58, would offer a practical response to the concerns of some small States, which feared that the trial and imprisonment of certain international criminals, such as those engaged in large-scale drug trafficking, could overwhelm their judicial systems and pose a serious threat to their security. The provisions of article 34, which were extremely important, would facilitate the determination of the court's jurisdiction. It would be necessary, however, to define the term "interested State", because too broad an interpretation of that term might not facilitate the work of the court and could stymie its operation.

62. Exceptions to the general rule that an accused person should be present at his trial should be allowed only in clearly defined exceptional cases, such as those proposed in article 37, paragraph 2. In the absence of the accused, all his rights must be respected.

63. The presumption of innocence was an accepted principle in common law. It was up to the prosecution to establish the guilt of the accused. However, it should be noted that the burden of proof was also cast upon the accused, namely the burden of proving the common law defences of consent, duress, self-defence or justification generally. The presumption of innocence was reflected in article 40 of the draft statute, and her delegation supported its inclusion. It also welcomed the provisions of article 47. The protection of victims and witnesses should in no way interfere with the full right of the accused to a fair trial. The provisions of article 44 were satisfactory, in particular the proposal to exclude any evidence obtained by illegal means, which would constitute a serious breach of the statute or of international law.

64. There was no doubt about the urgent need for a permanent international body to take effective action against individuals responsible for exceptionally serious crimes of international concern. The international community had already shown that once the political will was there, such tribunals could be established, as had been done in the case of the International Criminal Tribunal for the former Yugoslavia. However, she did not believe that a corpus of international criminal law could be elaborated through the establishment of ad hoc tribunals. A permanent court would not only contribute to the progressive development of international law but would also punish those who

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sought, with impunity, to destroy the very fabric of existing society. Accordingly, she supported the recommendations of the International Law Commission that the draft statute be submitted to Governments within the context of a conference of plenipotentiaries. The General Assembly should establish, at the present session, a mechanism for convening such a conference as soon as possible in order to conclude a convention on the establishment of an international criminal court.

65. Mrs. LADGHAM (Tunisia) thanked the Commission for the efforts it had made at its forty-sixth session and thanked Mr. Crawford, Chairman of the Working Group on a draft statute for an international criminal court, and Mr. Thiam, Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind, for the quality of the work submitted.

66. Although the Commission was essentially a technical body, it had to take into account the demands of reality, which did not coincide with those of simple law, and had accepted many of the comments made by delegations, including those of her own delegation; that was very gratifying. However, she had some further comments on the draft, first of all, concerning how the court should be established; Tunisia had already expressed its preference for a court that was an integral part and main organ of the United Nations since that would give it authority comparable to that of the International Court of Justice. If it were created by amendment to the Charter it would be more universal in character than if it were created by a treaty.

67. With regard to the court's jurisdiction, she noted with pleasure that the Commission had taken into account the wish of certain delegations to see the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment included in the list in the appendix. Provision would also have to be made for the possibility of including in the list other relevant legal instruments that might be elaborated in future. The proposed system whereby States could accept the jurisdiction of the court by declaration, except in the case of a crime of genocide, was acceptable.

68. With regard to the applicable law, she considered that the draft Code should constitute the basis for such law. The draft should contain provisions establishing specific penalties for each crime that fell within the court's jurisdiction. The Commission should be urged to proceed swiftly with the elaboration of the draft Code and, of course, to ensure that its provisions were consistent with those of the draft statute for an international criminal court.

69. With regard to the financing of the court, an issue that was closely linked to the establishment of the court, it did not seem very wise to impose that burden on the States Parties to the statute as the Commission was suggesting in draft article 2. Since the court served the interests of the entire international community, it would be preferable to have it financed from the regular budget of the United Nations; that was yet another reason for establishing the court as a main organ of that Organization.

70. Finally, she said that it would be premature to convene a diplomatic conference, given the difficulties that still remained on matters of substance. It would be better to arrange for consultations with a view to ironing out differences of opinion.

71. Mr. HAMAI (Algeria) thanked all members of the Commission for the quality of their report which invigorated the Committee's work each year, and also thanked Mr. Veredechetin for his clear and exhaustive introduction of the report.

72. With regard to chapter II of the report, concerning the draft Code of Crimes against the Peace and Security of Mankind, he paid tribute to the Special Rapporteur, Mr. Thiam, for his work, and expressed satisfaction at the fact that the Commission had resumed consideration of the draft Code, adopted in first reading at the Commission's forty-third session, in response to the mandate conferred by the General Assembly in resolution 48/31. The Commission had considered the general part of the draft Code concerning the definition of crimes, their characterization and the general principles, leaving the second part of the draft concerning crimes themselves. He was pleased that the Special Rapporteur proposed to limit the list of those crimes to violations which it was generally agreed constituted crimes against the peace and security of mankind.

73. He also wished to make certain specific comments: with regard to the definition of crimes, the proposal to adopt a conceptual or general definition, followed by specific reference to the crimes defined in the Code, seemed a satisfactory solution.

74. Article 5 of the draft Code, while limiting criminal responsibility to individuals, did not rule out the responsibility of the State. That article should be read in conjunction with other international legal instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. With regard to article 6, the question arose of the relationship between the draft Code and the draft statute for an international criminal court. In his view, they were two closely linked aspects of the same issue, namely, how to provide the international community with appropriate legal instruments to enable it to prosecute those who committed crimes against the peace and security of mankind; the Code and the statute were two indissociable and complementary instruments, indicative of the success of that undertaking. It was therefore unfortunate that people tended to deal with the issue of the court as though it were a separate issue, and to relegate the issue of the Code to second place. It should be remembered that the idea of establishing an international criminal jurisdiction had been prompted by the need for a judicial organ that would apply the draft Code of Crimes. The issue of the court was simply a sub-item of the overall issue of the elaboration of the draft Code, as was clearly demonstrated by the past history of the issue. Of course, the tragic current international events had conferred particular urgency on the issue of the court, but it would be inappropriate to rush into adopting the statute of a court without first defining the applicable law. In order to overcome that difficulty, the draft statute of the court sought to define, in article 20, which crimes were subject to the court's jurisdiction, providing for five categories. Of those, only the

crime of genocide presented no major obstacle, owing to the existence of the 1948 Convention on that subject. The other categories of crimes, except for aggression, had been included because they had been designated as crimes in the statute of the International Criminal Tribunal for the former Yugoslavia. It was paradoxical that efforts were being made to create an international criminal court that would apply a law defined in the decision of a political organ, the Security Council, making it seem as though the latter were almost the supreme source of international law. International justice required independence from the decisions of political organs; in the current state of positive international law, only by adopting the draft Code could there be a principal basis for the law to be applied by the future court.

75. Other provisions of the draft statute also prompted concern, particularly the method whereby the court would be established, its relationship to the United Nations and its jurisdiction, in the event that the Security Council decided to refer a matter to it under article 23 of the draft statute.

76. Regarding the manner in which the court was to be established, it was not sufficient to do so by means of a treaty, given the uncertainty that that would create with regard to universality, since States could opt not to become parties to the treaty. If, on the other hand, it was established as an organ of the United Nations, not only would the court be backed by the Organization's moral authority and its universal character but the unity of the international legal order in respect of criminal matters would be assured without detriment to the court's independence and autonomy. The argument that, in order to do so, it would be necessary to amend the Charter was not a very convincing one, since concluding a treaty was also a complex process. Moreover, discussions were currently under way on a series of reforms that would also require amendment of the Charter, thus it would be possible to invoke article 109 and to convene a general conference for the purpose of reviewing the Charter.

77. A question directly related to the previous one is the relationship that should exist between the court and the United Nations. The easiest course would be to make it part of the United Nations, preferably as a principal organ like the International court of Justice. The system needs a judicial organ to deal with matters of international criminal law and to fill a genuine legal vacuum and avoid recourse to special judicial bodies. Moreover, establishment of such bodies by a political organ is not unanimously supported for constitutional reasons and considerations of strict adherence to the law.

78. With regard to the competence of the court, article 23 of the draft attributes to the Security Council the authority to bring a complaint directly to the court under Chapter VII of the Charter, thereby derogating from the rule in article 21 which makes the court's competence contingent on State acceptance. There is no denying that the functions assigned to the Security Council by the Charter would be appreciably expanded. The consequences of that expansion had not been given enough thought and more than that, it lacked a sound legal basis. since the proposal did not have the unanimous support of the Commission, the article should be deleted. Furthermore, the proposed solution ignored the

prerogatives of the General Assembly in questions relating to the maintenance of international peace and security.

79. Mr. PREDA (Romania) said that he welcomed the completion of the draft Statute of an international criminal court since it was a well-known deficiency of international law that it lacked effective enforcement mechanisms. So long as there was no judicial organ to try persons committing crimes against the peace and security of humankind, there would be no substantive codification of international law in that field.

80. Referring to the method of establishing the court, he said that it should be by means of an international convention, adopted at a Conference of State Plenipotentiaries. That method had the practical advantage of guaranteeing wide acceptance of the convention, which was a prerequisite for the court's effectiveness and normal functioning. Moreover, it preserved the State's freedom of choice to become a party to the Statute or to accept the jurisdiction of the court. Owing to the complexity of the process, there was a temptation to establish it by virtue of a resolution of the Security Council, but that would exceed the confines of the authority enjoyed by the Security Council under Chapter VII of the Charter. Also, alternative procedures such as amending the Charter or a resolution of the General Assembly or of the Council would raise serious problems that would not be easy to overcome. With respect to the date of the future conference, he wondered whether it might not be appropriate to establish an intersessional ad hoc committee to discuss the issues related to the question.

81. With regard to its relationship to the United Nations, he said that the future court should be linked to the principal organs of the United Nations to enable it to operate effectively from the administrative and functional point of view. However, since it should not be a subsidiary organ, he concurred with the provision of article 2 of the draft statute which called for the conclusion of an agreement with a view to establishing an appropriate relationship.

82. The court should have jurisdiction ratione materiae over a very limited number of very serious crimes. At the present stage, they should include genocide, aggression, exceptionally serious crimes and systematic and large-scale violations of human rights. That assumption was based on the fact that only in exceptional cases were States ready to waive their sovereignty and yield to an international mechanism. He concluded by saying that the text of the draft statute worked out by ILC rightly touched on many issues that might be seen as technical details, but taken together, went to the heart of a fair trial.

83. Mr. KOLODKIN (Russian Federation) said that the work of the Commission at its forty-sixth session had been very productive and that its signal achievement had been the draft statute of an international criminal court. That text should be the basis for further work on the question until its completion because it consisted of rules and solutions that were balanced and reasonable.

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84. The court's jurisdiction applied both to international crimes defined by treaties in force and to crimes that contravened international law in general, which were confined to a series of specific cases. The court's jurisdiction should be regarded as a complement of national judicial systems. Its applicability to crimes traditionally covered by the principle aut dedere aut indicare was contingent on the fulfilment of certain conditions and was therefore exceptional. At the same time, in exceptional circumstances in which, in the opinion of the Security Council, those crimes constituted a threat to international peace and security, the jurisdiction of the court became virtually obligatory because the Council, in pursuance of Chapter VII of the Charter and leaving aside the precondition of acceptance in article 21 of the draft, could bring the complaint to the court.

85. The report clearly indicated that conclusion of a convention would be the most acceptable way to establish the court and the modalities of its relationship to the United Nations. Many States, including the Russian Federation, had been gratified to find that its comments had been taken into account in the new text of the draft. That was an important factor and another proof of ILC's expertise in arriving at acceptable compromise solutions on the most controversial issues. Of course, there would still be comments to be made on specific provisions of the draft statute with a view to improving the text, but it was not too much to ask that an effort be made not to alter the balance achieved by the Commission in its work.

86. In the end, beyond specific comments on the various provisions, what was truly important at that stage was to decide whether the international community needed a permanent international criminal court and whether the legal and political conditions existed for the establishment of such a body. His reply to both those questions was in the affirmative. It would really be too bad if the establishment of the court was once again indefinitely postponed.

87. The first United Nations attempts to establish a permanent criminal court were actually made in the late 1940s. In 1951, on instructions of the General Assembly, the Commission on International Criminal Jurisdiction prepared a draft statute of an international criminal court, but the time was not yet ripe and it never got off the ground. It would have been surprising if it had fared otherwise, but it would be more surprising and highly doubtful that history would now repeat itself, given the decisive changes that had occurred on the international scene. Today there were universal values shared by all human beings that had become part of general international law, international treaties and conventions and the general principles of law. Moreover, a precedent had been established for the establishment of an international criminal tribunal outside the context of the "conqueror-conquered" relationship and that had justifiably raised expectations in the international community. The time had come for the United Nations, which was created for the purpose of preserving peace and protecting generally recognized principles of law against attack by individual criminals and groups of criminals, to establish a permanent international criminal court.

88. It was understood that the completion and finalizing of the draft statute would take some time, but one or two years more did not matter; what did matter was to take a decision now that clearly demonstrated the political will of the Member States to give it practical effect. To that end, a preparatory commission should be set up with the mandate of organizing, within a fixed time-limit, a United Nations conference for the specific purpose of adopting the convention establishing the international criminal court. That was the response the international community expected from the Organization.

89. *Mrs. FLORES* (Uruguay) said that the forty-sixth session of the Commission had proved very productive, in particular with regard to the draft statute for an international criminal court and the law of the non-navigational uses of international watercourses.

90. Referring to the former, she said that although it dated back several decades, it was now a matter of priority following General Assembly resolution 47/33 of 25 November 1992. The process had to a large extent been speeded up by circumstances motivating the establishment by the Security Council of an International Criminal Tribunal for the Former Yugoslavia as well as the possibility of extending its mandate to include human rights violations in Rwanda.

91. The prospect of an increasing number of special courts and possible as to the reliability, consistency and absence of uniformity in the applicable law, not to mention the need for an appropriate response to situations of particular international tension, all meant that the matter was currently of special relevance. She therefore supported the suggestion contained in paragraph 17 of the Commission's report for the convening of an international conference of plenipotentiaries to study the draft statute and to conclude a convention on the establishment of an international criminal court. Furthermore, Uruguay believed that in view of its status the court must be an organ of the United Nations.

92. Given the nature, complexity and specific activities of the court as well as the increasing number of cases that might come under its jurisdiction, she was in favour of a permanent body working on a full-time basis. None the less, she understood those who preferred a more flexible solution for its gradual implementation, bearing in mind the possible economic and practical difficulties involved.

93. The law applied must be international public law, although that was an issue which required further consideration. For that reason, and since the issue was closely but not exclusively related to the draft Code of Crimes against the Peace and Security of Mankind, it would be advisable if the draft statute were finalized as soon as possible.

94. Questions relating to the jurisdiction of the court formed the backbone of the draft statute and were dealt with in Part 3. As far as jurisdiction *ratione materiae* was concerned, under present circumstances it seemed possible that the court would try individuals only. Notwithstanding, the provisions of article 20 of the draft statute should be brought into line with those of article 19 on the

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responsibility of States, which distinguished between international crimes and offences and circumstances where the State, apart from being obliged to provide reparation for the crime committed was also liable to sanctions. Furthermore, the definition of the crime of aggression (article 20 (b) of the draft statute) must be clarified, for according to General Assembly resolution 3314 (XXIX), such crimes could only be committed by States; it should also be made consistent with article 15 of the draft Code of Crimes against the Peace and Security of Mankind. She also had reservations regarding the provisions of article 23.

95. Jurisdiction ratione materiae was extremely complex and it was therefore essential to ensure the proper application of the two principles of criminal law: nullum crimen sine lege and nulla poena sine lege, which had been partially taken up in the draft statute.

96. Although international law did not prohibit, from a strictly legal standpoint, trials in absentia, the current trend in human rights was to limit that type of trial, as indicated in article 14, paragraph 3 (d), of the International Covenant on Civil and Political Rights.

97. Uruguay had already indicated that it was in favour of the prosecutor and agreed with the structure proposed in the draft statute.

98. Mr. RABBANI (Pakistan) said that the enactment of substantive law would be required to implement the provisions of article 19, paragraph 1 (b). While article 19, paragraph 2, provided that the procedural details should be established by the rules of the court, in order to ensure an impartial judicial process such rules must form part of the statute. Moreover, the crimes enumerated in article 20 must be more clearly defined, in particular the term "aggression".

99. The provisions relating to enforcement described in Part 8 of the draft statute were a cause for concern, for they would raise important constitutional issues for many Member States. As an alternative, the court orders could be carried out in conformity with the various provisions defined under international law.

100. Article 23, paragraph 3, required further consideration, since the possibility of judicial proceedings being politicized as a result of action taken by the Security Council could not be ruled out.

101. Substantive law, procedural law and the rules of the court would have to be clearly spelt out in order to guarantee the civil rights of suspects and those accused. Otherwise, it would be difficult for Member States to cooperate in that regard. In the international justice system special attention should be given to protecting the rights of the accused, taking into account factors that might not often be of relevance in the national context.

102. With a view to avoiding any ambiguities, the provisions in respect of qualifications required by judges, disciplinary action they might be liable to and investigation and trial procedures must be specified in clearer terms.

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103. The court should complement national criminal justice systems and should sit as and when required. Furthermore, its jurisdiction should be confined to individuals and should not involve States, which would be contrary to the principle of sovereignty and sovereign equality of States.

104. The establishment of an international criminal court, with the subsidiary organs mentioned in article 5 and other infrastructures, would entail an enormous financial outlay which might be an extra burden for the developing countries.

105. No real progress would be made unless substantive criminal laws were developed, international crimes accurately defined and penalties for them were prescribed. The establishment of an international criminal court involved many complex and difficult issues, such as jurisdiction, applicable law, court structure, prosecution and other matters which must be addressed with utmost care.

The meeting rose at 1.10 p.m.

UNITED NATIONS

General Assembly

FORTY-NINTH SESSION

Official Records

SIXTH COMMITTEE
21st meeting
held on
Friday, 28 October 1994
at 3 p.m.
New York

SUMMARY RECORD OF THE 21st MEETING

Chairman:	Mr. MADEJ (Vice-Chairman)	(Poland)

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Distr. GENERAL
A/C.6/49/SR.21
7 November 1994

ORIGINAL: ENGLISH

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In the absence of Mr. Lamptey (Ghana), Mr. Madej (Poland), Vice-Chairman, took the Chair.

The meeting was called to order at 3.20 p.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. de SARAM (Sri Lanka), referring to chapter II of the report of the International Law Commission (A/49/10), said that, with the completion of the draft statute for an international criminal court, the Commission had fulfilled the mandate conferred on it by the General Assembly. Whatever action the Assembly and Governments now deemed it appropriate to take on the draft statute, the fact remained that, because of the Commission's efforts, the international community was now much closer to consensus on the question of the establishment of such a court than ever before.

2. The concept proposed and developed by the Commission - namely, that the court would not be a full-time body, but a permanent mechanism that could be called into action as and when needed; that it would be established by means of a treaty and would work in close cooperation with the United Nations; that it would coexist with, not detract from, the numerous international agreements on extradition and judicial cooperation and assistance; and that its jurisdictional coverage would reflect concern for the sovereignty of States and the prerogatives of national jurisdictions - appeared to be the most reasonable course. The establishment of an institution of such significance and scope would clearly require an amendment to the Charter of the United Nations.

3. However, while recognizing the usefulness of the concept proposed by the Commission, his delegation believed that it would be overly optimistic to convene immediately a conference of plenipotentiaries to consider the draft statute. Governments and their various ministries must be given time to gain a full understanding of the draft provisions and their ramifications. If such a conference was to succeed, extensive pre-conference planning would be absolutely essential. The key issues should be identified in pre-conference papers together with the various alternative solutions proposed.

4. As the report of the Commission made clear, the draft statute was to be annexed to a treaty which had yet to be drawn up. In its appendix I to the draft articles, the Commission indicated some of the matters to be covered by such a treaty, including the manner in which States parties would participate in the administration of the treaty and the court, and the financing of the court. In that connection, the special expertise of the United Nations budgetary authorities would be required. Other matters which must be addressed included the questions of whether reservations to the treaty should or should not be permitted, how disputes over the interpretation and application of the treaty should be settled, and the conditions for the entry into force of the statute. While such issues were not insoluble, negotiating a consensus on them would be time-consuming.

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5. It was also unclear whether the technical provisions contained in a number of draft articles were satisfactory from the point of view of Governments. In particular, articles 20, 21, 23 and 25, which dealt with the court's jurisdiction, would require careful governmental review.

6. With regard to draft article 20, the following questions must be answered at the outset: (a) whether crimes within the jurisdiction of the court had already been defined under general international law in a manner applicable to individuals in accordance with the nullum crimen sine lege principle; and (b) whether the crimes were of such scope that they required international adjudication, national jurisdictions being, for one reason or another, inoperative.

7. An obvious solution to such questions would be an international code of crimes which would be generally acceptable and which would meet nullum crimen sine lege requirements. That would lend order and clarity to the substantive law to be applied by the court. However, a number of speakers had expressed the view that in its current form, the draft Code of Crimes against the Peace and Security of Mankind was too controversial to allow for such adjustments as would be necessary to make it generally acceptable. Despite that fact, his delegation believed that the prospects for negotiation of a generally acceptable code of crimes had been improved by the transfer of many of the jurisdictional and procedural aspects of the draft Code to the draft statute. Nevertheless, his delegation agreed with the Commission that work on the draft statute should not be delayed until such time as a generally acceptable code of crimes could be completed.

8. While there was no question as to the horrendous nature of the crimes referred to in draft article 20, especially in paragraphs (a) and (e), it was conceivable that there could be differences on whether the crimes referred to in paragraphs (b), (c) and (d) - namely, aggression, serious violations of the laws and customs applicable in armed conflict and crimes against humanity - had been adequately defined in accordance with the criteria mentioned earlier.

9. Turning to draft article 23 (Action by the Security Council), he said that it was uncertain whether the provisions of that article were necessary or appropriate. The draft article would introduce into the statute a substantial inequality between States parties to the statute, between States members of the Security Council and non-members, and between the permanent members of the Security Council and other States. Accordingly, it did not seem likely to encourage the widest possible adherence to the statute.

10. Moreover, the provisions of the Charter of the United Nations, especially those of Chapter VII of the Charter, would always prevail over any other international agreements between Member States, and thus over a treaty establishing an international criminal court. It was therefore unnecessary for the statute to reaffirm the primacy of the Charter.

11. If the Security Council believed that a specific matter should be referred to an international criminal court, an appropriate procedure for such referral

would undoubtedly be found. The prior limitations which draft article 23 would impose on the prerogatives of national jurisdictions were likely to raise concern and to increase States' hesitations about becoming parties to the statute. Accordingly, his delegation believed that, in lieu of draft article 23, it would be preferable to include in the statute a preambular paragraph, similar to the one contained in the annex (Definition of Aggression) to General Assembly resolution 3314 (XXIX), stating that nothing in the respective definition should be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations.

12. Lastly, he had been informed by the Treaty Section of the United Nations Office of Legal Affairs that the 1988 Protocol to the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation had entered into force on 6 August 1989; that should be taken into account whenever the draft statute was finalized.

13. Mr. MAIGA (Mali) expressed appreciation to the Commission for its completion of the draft statute for an international criminal court. With regard to the various proposed methods of establishing the court and its relationship to the United Nations, his delegation believed that a close relationship between the court and the United Nations would confer an international character and moral authority on the court. His delegation supported the convening by the General Assembly of an international conference of plenipotentiaries to consider the draft statute with a view to concluding a treaty establishing an international criminal court. While the treaty establishing the court would thus be binding only on States parties to its provisions, it could be linked to the United Nations system under Articles 57 and 63 of the Charter.

14. His delegation noted with satisfaction the provision in draft article 21 that States must expressly accept the court's jurisdiction for the court to have jurisdiction.

15. With regard to the draft Code of Crimes against the Peace and Security of Mankind, his delegation regretted the delays in the Commission's consideration of the item, which had been on its agenda since 1947. In order for the international criminal court to have at its disposal a legal framework which would contain definitions of the crimes referred to in article 20 of the draft statute, his delegation strongly urged the Commission to intensify its work on the draft Code.

16. Turning to chapter III of document A/49/10, his delegation noted with satisfaction the conclusion by the Commission of its consideration of the item, which had been on its agenda since 1971.

17. Mr. AREVALO (Chile) said that the establishment of an international criminal court corresponded to a clear need of the international community and would fill a vacuum in its legal structure; the court would operate alongside the International Court of Justice, which, under its Statute, played a different

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jurisdictional role in administering justice at the international level. The need for such a court was clear from the proliferation of bodies which had been established as a result of specific situations, for example in the former Yugoslavia or Rwanda. Such tribunals were a valid but limited response to the lack of an international criminal court with competence to hold individuals responsible for serious crimes. The establishment of the court must be approached in a flexible, realistic and gradual manner; the best possible statute must be sought, rather than the ideal statute, so that a large number of States would support it, thereby providing the vital basis for its legitimacy.

18. In accordance with the preamble to the draft statute, the court was intended to be complementary to national criminal justice systems in cases where such trial procedures might not be available or might be ineffective. Increasingly, national courts were applying international instruments; thus, it should not be felt that the granting of universal jurisdiction to national courts, and judicial cooperation among States for the purposes of the administration of justice, would no longer be valid as instruments after the establishment of the court.

19. His delegation felt that the court should be established by means of an international treaty to which the largest possible number of States would be parties. That would provide the Court with its essential political and legal basis. A General Assembly resolution would not give the court a sufficiently firm foundation. Nor would it be satisfactory for the Security Council to establish an international criminal court. Moreover, for purely practical reasons, it would not be realistic to amend the Charter and establish the court as a new principal organ of the United Nations.

20. At the same time, however, the court must have a clear and close relationship with the United Nations, since that would afford it legitimacy and political backing. That relationship could be established initially through the adoption of the text by the General Assembly, subject to subsequent ratifications. Other links should be established with the United Nations with a view to the more effective functioning of the Court.

21. With regard to the court's subject-matter jurisdiction (art. 20), his delegation felt that the list in the annex should not exclude any international criminal treaty that was in force and that the court's jurisdiction should extend only to the most serious crimes contained in those treaties. The provision on admissibility in article 35 was an adequate safeguard. At the same time, a mechanism should be established to allow the inclusion of new treaties within the court's jurisdiction without the need to amend the Statute in each case. That situation could cover, for example, crimes committed against United Nations staff and related personnel.

22. His delegation could accept the division between inherent jurisdiction, in respect of the crime of genocide, and ceded jurisdiction, in respect of other crimes, and the idea that it was not necessary to be a party to the statute to accept the jurisdiction of the Court. That was an adequate solution at the current stage of development of international law, and it gave sufficient

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flexibility to States parties. In respect of ceded jurisdiction, his delegation supported the idea that both the custodial State and the State on whose territory the crime was committed would need to accept the court's jurisdiction. The custodial State should be the State in which the accused had actually been detained and not the State or States to which orders for detention had been sent because they were believed to have jurisdiction to hear the case. His delegation supported the idea that the State of the accused's nationality should not be required to accept the court's jurisdiction. That State could not replace the territorial State, particularly in criminal matters, or the custodial State, for practical reasons. If the State of the accused's nationality was added to the list of States which were required to accept the jurisdiction of the Court, that would unnecessarily complicate the function for which the court was to be established. Although acceptance of the court's jurisdiction by the State which initiated an extradition procedure might seem excessive, that was totally consistent with the general spirit of the draft statute that the court was complementary to national courts.

23. With regard to the role of the Security Council under the draft statute, his delegation felt that article 23, paragraph 1, was acceptable, on the understanding that the Security Council would confine itself to referring a matter to the court and the court would initiate the investigation. That provision would enable the court, without the need for acceptance of its jurisdiction, to consider crimes covered in the statute perpetrated even in States which were not parties to the Statute where there was no possibility of administering justice through national courts. In such cases the Security Council, acting under Chapter VII of the Charter, could take a case to the court without having to establish an ad hoc criminal tribunal as had been the situation in recent cases.

24. With regard to paragraph 2, however, it was not acceptable that a complaint of or directly related to an act of aggression could not be brought unless the Security Council had first determined that a State had committed an act of aggression. Although legitimate under Article 39 of the Charter, such determination was political in nature and was subject to the exercise of the veto power. That situation would greatly limit the operation of the court, particularly since there could be a number of other crimes directly related to an alleged act of aggression which would also fall within the court's jurisdiction but might not be referred to it. It was not fully acceptable that such a determination should be made by the Court either since there could be differences of opinion between the two bodies which should be avoided. A new solution needed to be found. Similar problems arose in relation to paragraph 3; it was not appropriate that no prosecution could be commenced under the statute arising from a situation that was being dealt with by the Security Council.

25. With regard to article 39, subparagraph (6), it was not clear how it would be determined that a treaty was applicable to the conduct of the accused at the time the act or omission occurred: whether it would suffice for the treaty to have been in force at the international level, or whether it would also have to have been fully incorporated in the domestic legal system; and whether the countries which would need to recognize the court's jurisdiction would have to

be parties to the treaty in question. The draft statute should establish some criterion for making that determination.

26. Article 54, on the obligation to extradite or prosecute, contained a provision that was fundamental in most of the treaties included in the annex to the statute. However, in the text of the statute, the obligation was not extended to the crimes contained in article 20, paragraphs (a) to (d), namely crimes covered by general international law. Although that could be explained in respect of the crime of genocide, since only the State in which the crime had occurred had jurisdiction, the draft statute must provide for the obligation to expedite or prosecute in respect of the other crimes listed.

27. An element which could have been included in the draft statute was advisory jurisdiction of the Court. That type of jurisdiction had been very useful in the context of other international instruments and had been of great help for national courts in interpreting international instruments they were required to apply.

28. Although the Court was closely linked with the draft Code of Crimes against the Peace and Security of Mankind, his delegation felt that the Court should be established independently.

29. Mr. ODOI-ANIM (Ghana) said that the rationale for the establishment of the Court as stated in the preamble was consistent with Article 1, paragraph 1, of the Charter. There was therefore a connection between the effective operation of the court and the draft Code of Crimes against the Peace and Security of Mankind. Article 2 of the draft statute did not convey a sense of urgency in the establishment of a relationship between the court and the United Nations; the phrase "appropriate relationship" left room for varying degrees of interpretation which could have a negative impact on universal acceptance of and allegiance to the court. His delegation felt that article 2 could be merged with article 1 without jeopardizing the relationship of the court to the United Nations. It could accept articles 3, 4 and 5 as currently formulated.

30. The question of the jurisdiction of the court needed to be considered in the light of current and future political realities. The crimes referred to in article 20 usually had political underpinnings, and that could compromise the commitment of States to a strict and restrictive legal regime. To avert such a situation, articles 20, 21 and 22 needed to be further clarified.

31. The current draft was a commendable effort in the direction of ensuring individual accountability for acts against the international community, and Ghana agreed that that objective could be achieved by clear rules, particularly those relating to evidence, applicable sanctions and the rights of accused persons. Article 41 might require additional inputs which would provide the necessary psychological guarantees to offset any handicap that an accused person might encounter when appearing in an alien and culturally different environment to respond to criminal charges.

32. His delegation felt that further consideration needed to be given to article 44, paragraph 2, because, if the anticipated cooperation was unavailable, a vital component of the adjudication procedure would be incapacitated. Article 19, paragraph 1 (b), was more effective on the question of the rules of evidence to be applied. Article 46 must include more objective criteria, particularly in subparagraph (2).

33. His delegation could accept part 7 of the draft statute; it believed that States should coordinate their efforts in order to ensure the effective functioning of the court. However, any such cooperation must take due account of national criminal jurisdiction, bearing it in mind that it was not the aim of the Court to supplant national courts in the sphere of criminal jurisdiction.

34. Turning to the draft Code of Crimes against the Peace and Security of Mankind, he said that the new text of article 1 was acceptable; it provided a flexible definitional framework and could accommodate future developments and suggestions. Ghana felt that the first sentence of article 2 must be reformulated to recognize the link between the Code and the criminal codes of States. It agreed that the second sentence of the article should be deleted. It would comment on the rest of the Code at a later stage.

35. Recognizing the full significance of the work of the Commission, his delegation felt that at the current stage, issues of financial consideration should not be permitted to derail the collective efforts which, if pursued to their conclusion, would be of immense benefit to the international community.

36. Mr. MIKULKA (Czech Republic) commended the Commission's efforts to accommodate the views of States in order to provide a basis for the broadest possible acceptance of the draft statute. His delegation welcomed the recommendation regarding the convening of an international conference of plenipotentiaries.

37. If the draft statute was adopted by means of a treaty, there was a risk that the interval between its adoption and its entry into force would be fairly long. If, during that period, a situation arose resembling that in the former Yugoslavia or Rwanda, the Security Council would not be able to take advantage of the mechanism of the court and would be forced to establish an ad hoc tribunal; thus, one of the objectives sought in the establishment of the court would not be achieved. His delegation therefore felt that provision should be made for having recourse to the court on a provisional basis in such situations. The possibility of establishing the court as both a treaty body and a subsidiary organ of the Security Council, mentioned in paragraph 52 of the Commission's report, was only one possible solution. Another solution would be for the statute to provide for some kind of provisional application in situations covered by Chapter VII of the Charter, following the adoption of a Security Council resolution to that effect. Such a solution would further strengthen the organic link between the court and the United Nations.

38. There must be a close link between the court and the United Nations; however, that did not necessarily mean that the court should be envisaged as one

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of the principal organs of the Organization. The link could not consist solely of the conclusion of an agreement between the Court and the United Nations as envisaged in article 2. It was above all functional and, as such, was established by the relevant articles of the statute concerning, in particular, the referral of matters to the court by the Security Council. Subject to those considerations, his delegation felt that, in principle, the solution to the problem of the link between the court and the United Nations as currently envisaged, in the draft statute was satisfactory.

39. On the question of the court's subject-matter jurisdiction, the current drafting of article 20 was an improvement on the previous draft, particularly in respect of crimes under general international law. It would be difficult to justify placing such crimes outside the jurisdiction of the court, particularly crimes directly linked to an act of aggression which were not currently defined in a multilateral treaty; that would be a step backwards. His delegation therefore noted with satisfaction that article 20 placed crimes under general international law on an equal footing with the crimes established under or pursuant to the treaty provisions listed in the annex. The list of crimes under general international law that were within the jurisdiction of the court, should meet the concerns of those who wanted such crimes to be defined more clearly. At the same time, the Czech Republic was pleased that the Commission had noted that there was considerable overlap between crimes under general international law and crimes under or pursuant to certain treaties and that article 20 (a)-(d) was not intended as an exhaustive list of crimes under general international law.

40. The Czech Republic was particularly satisfied to see that the crime of aggression had been included in the list of crimes within the jurisdiction of the court. According to article 20 (e), the court also had jurisdiction over crimes pursuant to the treaties listed in the annex to the statute. The treaties could be divided into two groups: those which defined certain acts as international crimes and those which provided for the suppression of undesirable behaviour constituting crimes under domestic law. It was clear that the urgency of bringing treaty crimes before an international court varied considerably. Article 20 (e) reflected his delegation's conviction that the jurisdiction of the court must be limited to the most serious crimes, those which the international community found most repugnant, and that the court should not be burdened by less exemplary matters.

41. In the earlier version of the statute, the court, with the exception of cases referred to it by the Security Council, had possessed only optional jurisdiction. However, that approach had failed to reflect fully the aims of establishing such a court. The current draft was more satisfactory. Optional jurisdiction had been combined with "inherent" jurisdiction and, at the same time, the court would continue to have jurisdiction over crimes referred to it by the Security Council.

42. The introduction of inherent jurisdiction was a step forward. It would show to what extent the international community was prepared to make the court a genuinely effective body. If States failed to accept even the minimum inherent

jurisdiction proposed under the current draft, the court's effectiveness would be called into question. His delegation agreed with Greece and Switzerland that the court should be vested with even broader powers of inherent jurisdiction. However, since the broadest consensus possible would be needed to establish the court, it was best to endorse the current solution and not press the issue.

43. Article 22 provided an "opting-in" system for accepting the jurisdiction of the court; the other methods of acceptance proposed previously had been eliminated. Under the current draft, the court had inherent jurisdiction in one area and could also have a matter referred to it by the Security Council; there was accordingly no practical reason to maintain the other systems for accepting the court's jurisdiction.

44. Article 21 (b) rightly specified that the preconditions to the exercise of jurisdiction by the court were acceptance of it by the custodial State and the State on the territory of which the act in question had occurred. Most of the treaties listed in the annex were based on the principle of universal jurisdiction. In theory, acceptance of the jurisdiction of the court by any State which was party to the relevant treaty should be adequate to establish the court's jurisdiction. In practice, it was best to clarify that the acceptance of two specific States was needed, as had been done in article 21 (b). However, it would be inadvisable to expand that list any further; to do so would make the preconditions too cumbersome and would limit the court's effectiveness.

45. The court was intended, to the extent possible, to replace ad hoc tribunals. In that connection, article 23, which provided that the court had jurisdiction over matters referred to it by the Security Council, was a fundamental provision which strengthened the link between the court and the United Nations. According to article 23 (2), a complaint of an act of aggression could not be brought under the statute unless the Security Council had first determined that a State had committed the act of aggression in question. His delegation viewed that provision as purely procedural in nature; it had no implications for substantive law. Although far from ideal, solution offered by article 23 was realistic and fully justified. Draft article 33 provided a satisfactory approach to the issue of applicable law by listing under that category the applicable treaties as well as the principles and rules of general international law. The two categories frequently overlapped and, as a result, the court could have recourse to the applicable law without being handicapped by the fact that a State was not party to a particular convention.

46. The court was naturally limited in terms of the rules of national law that it might apply. Clearly, such rules could not be applied where they failed to conform with international law. Defining any act or omission as a crime under international law must be independent of national law. The primacy of international law over national law, in the case of a conflict between the two, should be expressly stated in article 33.

47. The Czech Republic did not, however, share the view that national law was completely irrelevant. Indeed, jurisdiction ratione materiae included crimes defined by international instruments which provided for the suppression of those

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crimes initially by means of national law. Moreover, all States had a common fund of law in the areas of the protection of fundamental rights and criminal procedure. Thus, while international law provided an adequate basis in terms of jurisdiction ratione materiae, related questions might necessitate recourse to national law.

48. Under article 25 (1), the right to lodge a complaint of genocide was limited to States which were party to the Convention on the Prevention and Punishment of the Crime of Genocide. That restriction could not be justified. Genocide was considered in the statute to be a crime under general international law and was the only crime within the inherent jurisdiction of the court. Accordingly, any States party to the statute of the court should be entitled to lodge a complaint relating to genocide.

49. It was both reasonable and realistic to limit the lodging of complaints to States which had accepted the court's jurisdiction and to the Security Council, acting under Chapter VII of the Charter. A more liberal system might discourage States from becoming party to the statute or accepting the court's jurisdiction out of fear that other States which had not done so might abuse their privileges.

50. Even if it did not accept the court's jurisdiction, a State party to the statute was bound by certain obligations which effectively complemented the system of jurisdiction.

51. In selecting the members of the court, it was essential to bear in mind the principle of equitable geographical representation. The international community must be careful that the unfortunate experience in that connection associated with the International Tribunal for the former Yugoslavia did not reoccur.

52. In conjunction with the elaboration of the draft statute, it was important to continue the efforts to codify substantive law, at least in respect of crimes falling within the court's jurisdiction. He therefore welcomed the progress that had been made by the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind.

53. Recent events had reaffirmed the topicality of establishing an international court to deal with individual criminal responsibility for crimes of international concern. The draft statute provided a solid basis for further work. His delegation endorsed the Commission's proposal to convene a conference of plenipotentiaries. It also endorsed the idea of setting up a preparatory committee for the purpose of arriving at generally acceptable solutions to questions that might give rise to difficulties at the conference. The preparatory committee must prepare the way for the conference rather than undermine it by fruitless and endless debate. For that reason a clear and precise mandate for the committee was an essential precondition to its establishment.

54. Mr. NEGA (Ethiopia) said that one of the Commission's significant achievements was the completion of the draft statute for an international

criminal court. Faced with current realities, including recent human tragedies in some parts of the world, the international community must see to it that those responsible for serious crimes of international concern were brought to justice and that similar tragedies did not occur elsewhere. While it was incumbent on Governments to bring such individuals to justice, the international community could complement and assist national efforts, in particular in situations where national authorities were not in a position to maintain law and order.

55. Article 2 of the current version, on the relationship of the court to the United Nations, required further review. The court should be independent, impartial and universal in its approach. It would be best to establish it as a subsidiary organ of the United Nations, thereby ensuring that adequate resources were available to it without compromising its integrity or independence.

56. According to article 6 (5), States parties to the statute should, in electing judges, bear in mind the principle of equitable representation of the main legal systems of the world. The principle of equitable geographical representation should also be emphasized in that context.

57. The most important provisions of the draft Statute were those concerning the jurisdiction of the court and applicable law. Ethiopia felt that the jurisdiction of the court ratione personae should be limited to individuals. Article 21 set forth the preconditions to the exercise of the jurisdiction of the Court over a person with respect to the crimes referred to in article 20. The issue of jurisdiction ratione personae needed to be addressed in a separate article, in an unambiguous manner.

58. The jurisdiction of the court ratione materiae was the most controversial issue in the draft statute. The draft had been substantially improved in that respect since the previous year. The Commission had incorporated the vital element of specificity into the draft by providing, in article 20, a complete list of the crimes over which the court would have jurisdiction. Two of the crimes on that list - the crime of genocide and serious violations of the laws and customs applicable in armed conflict - were clearly defined in the international instruments on those subjects. In contrast, two other categories of crime - the crime of aggression and crimes against humanity - were not clearly defined for the purposes of establishing the court's jurisdiction. In particular, its jurisdiction over the crime of aggression required further clarification. The Court's jurisdiction ratione personae was limited to individuals, while aggression was an act of State, as defined in the annex to General Assembly resolution 3314 (XXIX). The problem of establishing individual criminal responsibility for the crime of aggression was also implicit in article 23 of the draft statute, according to which a complaint related to an act of aggression could not be brought under the statute unless the Security Council had first determined that a State had committed such an act of aggression.

59. In view of those considerations and others pertaining to applicable law, his delegation was of the view that finalization and adoption of the draft Code

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of Crimes against the Peace and Security of Mankind would contribute substantially to advancing the work on the statute.

60. The relationship between the proposed international criminal court and national courts was a matter which also merited close scrutiny. In that connection, his delegation failed to see the merit of paragraph 2 of article 42, which left open the possibility that, under certain circumstances, a person who had already been tried by one court could in fact be tried under the statute. That provision not only violated the principle of *non bis in idem* but also placed the court in a superior position *vis-à-vis* national courts.

61. With regard to article 23, Ethiopia felt that only States parties to the statute could and should be entitled to lodge a complaint with the court. Granting that right to the Security Council was inconsistent with the Council's mandate and contradicted the very nature of such a court, which would be established to deal with individual criminal responsibility. If, however, it was decided to accord the Security Council the right to refer cases to the Court, that same authority should be granted to the General Assembly in connection with matters falling within its mandate.

62. **Mr. GOGOBERIDZE** (Georgia) said that he wished to pay tribute to the efforts of the Commission and, in particular, to its Chairman and the chairmen of its working groups. The Commission had made considerable progress in its second reading of the draft Code of Crimes against the Peace and Security of Mankind. After its approval and entry into force, the Code should be administered by the proposed international criminal court.

63. His Government attached great importance to the establishment of such a court. Its existence would greatly strengthen the rule of law, which provided the necessary foundation for the development of fledgling democracies throughout the world and had been a prerequisite to Georgia's successful transition from communism to democracy and to full participation in the international community.

64. He looked forward to the establishment of a permanent jurisdictional body that would ensure that gross violations of international humanitarian law were punished, as they were to be in the former Yugoslavia and Rwanda. Georgia felt that such a court should be established under a multilateral treaty and that its relationship to the United Nations should be based on the conclusion of an agreement between the United Nations and the court. It also believed that the court should be a permanent institution sitting only when cases were submitted to it.

65. The court's jurisdiction was the pivot of the entire statute: it should address the most serious crimes threatening the international community, regardless of whether those crimes were covered by treaties specified in the statute or by general international law. He welcomed the fact that the court was to be complementary to national criminal justice systems and that the fundamental rights of the accused were assured. Georgia felt that a conference of plenipotentiaries should be convened in 1995, since the establishment of an

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international criminal court was a project of great importance to the world community and should be proceeded with as fast as possible.

66. Ms. ARIFFIN (Malaysia) said that there was no doubt of the need for an international criminal court, as evidenced by the tragic events in the former Yugoslavia, Somalia and Rwanda. The setting up of a permanent judicial institution would be greatly preferable to the plethora of ad hoc tribunals to deal with such crimes.

67. The proposal that the court should be complementary to national criminal justice systems would go some way to allaying the concerns of some States regarding the possible usurpation of the jurisdiction of their national courts by the international criminal court. As for the relationship between the court and the United Nations, it was her delegation's view that it was an unfortunate omission not to have stated what the mechanism for the establishment of such a relationship should be. That issue, and the related question of budgetary arrangements, would need to be resolved if the process was to move forward. On the other hand, she welcomed the approach, in draft article 20 (a) to (d), of identifying the crimes under general international law which fell under the court's jurisdiction. The list of crimes should not, however, be exhaustive and, in addition to the crimes listed in the annex, her country believed that States parties to the statute should be able to agree at a subsequent stage on additional crimes to be included.

68. With regard to the acceptance by States of the court's jurisdiction, her delegation had previously argued in favour of the "opting-out" system, believing that States should not lose sight of the fact that the court's jurisdiction would be over individuals and not States. States had no need to feel that their sovereignty would be compromised, while the "opting-in" system imposed too many restrictions and would result in an ineffective institution. Her delegation was, however, persuaded by the argument that an opting-out regime would have the effect of preventing a State from accepting jurisdiction in respect of a complaint which had already been brought, which would be undesirable. If the majority of States felt that the opting-in procedure proposed by the Commission would have the effect of encouraging a larger number of States to become parties to the statute, her delegation would be prepared to accept the will of the majority on the matter.

69. Her delegation was intrigued by the provisions contained in article 23, conferring powers on the Security Council to refer crimes enumerated in article 20 to the court and imposing restrictions on the prosecution of the crime of aggression before the court unless the Security Council had determined that a State had committed such an act of aggression. Malaysia wished to study the implications of the article further. Lastly, her delegation supported the Commission's recommendation that a diplomatic conference should be convened. She shared the view of others that a decision on the date of such a conference should be decided at the current session. An appropriate date would be the latter part of 1995, which would leave sufficient time for consultations among Governments regarding the removal of remaining areas of difficulty in the draft statute.

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70. Mr. LAHMIRI (Morocco) said that, in view of the significant increase in serious international crimes which often went unpunished, work on establishing an international criminal court should proceed with all possible speed, on the basis of a statute which would have the support of the widest possible range of countries. His delegation had no objection to the convening of a diplomatic conference on the matter in 1996, although it hoped that 1995 would be used effectively to finalize discussion on the instrument. It was to be hoped that the establishment of the court could give the interpretation and application of international criminal law a uniformity and coherence that they lacked under the present arrangement of ad hoc tribunals.

71. With regard to the composition of the court, he stressed the need for credibility, which would be achieved only if due regard was paid to the choice of judges. While welcoming the criteria established, his delegation was concerned that the qualifications sought - aiming for 10 judges with criminal trial experience and eight with recognized competence in international law - might create problems of recruitment. A simpler solution would be to appoint judges with expertise in both areas. The draft statute should establish the eligibility criteria and leave it to States to determine the question of judicial qualification. With regard to the jurisdiction of the court, his delegation believed that such jurisdiction should extend automatically to all the crimes listed in article 20, subparagraphs (a) to (d); the restrictions permitted under article 22 would serve only to undermine that jurisdiction.

72. The cardinal principle of criminal law was that no one should be convicted except under a specific law (nullum crimen sine lege). His delegation therefore strongly held the view that there should be a link between the draft statute and the draft Code of Crimes against the Peace and Security of Mankind. The highest priority should be given to elaborating a code on which all could agree. His delegation was glad that the Commission accorded the subject the same priority.

73. Morocco supported the recommendation in draft article 2 that the relationship between the court and the United Nations should be based on an agreement between the two. As for funding, given the inevitably high costs of the court's work, a serious cost-effectiveness study should be put in hand to weigh up the various financial considerations involved.

74. With regard to parts 4, 5 and 6 of the draft statute, his delegation believed that the rights of the accused were properly protected, since the articles concerned were largely based on the principal international human rights instruments. Some of the penalties proposed, however, were disproportionately lenient. The imposition of a fine for crimes characterized as serious was an issue which should be reviewed. Although there might be other points of disagreement regarding the draft statute, which were due to the complexity of the subject and the interpretation of various provisions, it was to be hoped that nothing would prevent the speedy establishment of the court.

75. Turning to chapter V of the report, dealing with international liability for injurious consequences arising out of acts not prohibited by international law, his delegation was pleased to note that the special situation of developing

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countries had been covered in a general provision applying to all the draft articles on the matter. His delegation also supported the recommendation contained in paragraph 368 that a consortium of all States parties to the convention, or private operators of those States parties, should be created to bear the subsidiary liability. With regard to civil liability, some good ideas had been put forward, but he recalled that a well-functioning compensation mechanism existed, which should be taken into consideration. Similarly, it was clear that the operator bore liability in so far as he was in control of the activity and was the primary beneficiary. His delegation shared the Special Rapporteur's approach in that regard.

76. His delegation was pleased that, despite differences of opinion, the Drafting Committee had adopted 12 articles on prevention, although it would be desirable to clarify the second sentence of article 11, particularly with regard to the periodicity of authorization. Moreover, in article 12 there should be more emphasis on the role of the State in risk assessment. That role should consist in direct intervention in the evaluation process; it should not be acceptable for an operator alone to carry out such an evaluation. The same person could not be the judge and the judged. Only the State should have the right to undertake such an assessment. With regard to the sensitive issue dealt with in article 15, his delegation would prefer to see an amalgamation of articles 15, 16 and 16 bis into a single article, since they related to aspects of the same subject, namely notification and information, exchange of information and information to the public. Regarding article 17, security should not be made a pretext for concealing information or refusing to cooperate.

77. Lastly, with regard to the law and practice relating to reservations to treaties and State succession and its impact on the nationality of natural and legal persons, covered in chapter VI of the report, his delegation hoped that when those two subjects were dealt with, full consideration would be given to the practice and the interests of all countries.

78. Mr. KALITA (India) welcomed the continuing progress in the difficult matter of drafting a code of crimes against the peace and security of mankind, which was indispensable for the eventual establishment of an international criminal justice system. The draft Code might not be as comprehensive as he would wish, but it should incorporate those categories of conduct around which the greatest consensus among States could be built, providing effective deterrence against the commission of crimes specified in it. Other categories of conduct should, he believed, be left unaffected in international law. Although flexible about the manner in which the crimes contained in the Code were defined and therefore having no objection to the deletion of the words "under international law" in article 1, his delegation would prefer that the point he had just made should be reflected in the commentary. Moreover, the general definition given in article 1 was not very helpful, except in a limited sense. Such a definition should also indicate that the crimes proposed to be included should cover other categories of conduct, such as crimes against humanity.

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79. With regard to the point made by the Special Rapporteur in draft article 2, on characterization, he agreed with those who suggested that the code should not project any conflict between characterization of a form of conduct as a crime under the code and the manner of characterization of the same conduct as a crime under national or international law. Most of the crimes suggested for inclusion in the code were also crimes under national law of States in any case, or should be once the code was adopted by a State.

80. Regarding article 3, on responsibility and punishment, he considered it quite obvious that the person committing a crime and those assisting or abetting in that crime were equally punishable. The article could draw considerable support from the various international and bilateral conventions on the suppression of crime. He added that concepts like "attempt" should not be defined within the code, but should be determined by the Commission in specific cases on the basis of generally recognized practice.

81. Article 4, on motives, was important and it would not be desirable to delete the article. Persons who committed crimes should not be able to argue that they committed the crime for political reasons and should therefore be immune from punishment. A distinction could be drawn between "motive" and "intent", but that could not extend to racism or, in particular, national hatred, which were not generally cited as exceptions in any similar instrument. Any such reference to extraneous considerations would make the article liable to be rejected as being unacceptable. Moreover, "extenuating circumstances" were not synonymous with "motive". Extenuating circumstances could not be a reason not to treat a particular act as a crime, though they might be considerations for lessening punishment once a crime had been established. The scope and conditions under which "exceptions", "motives" and "extenuating circumstances" could be pleaded should be clarified.

82. While appreciating the conceptual difficulties inherent in article 5, which dealt with the responsibility of States for crimes committed by its agents or agencies, his delegation believed a way should be found to specify the exact nature of the responsibility or liability of States, either in the article itself or in the commentary. Indeed, the purport of article 5 seemed to be inconsistent with article 19 of part 1 of the draft articles on State responsibility. Since it was customary to speak of the responsibility of States in the context of their obligation to pay compensation or make reparation to victims of violations of international law, the article under consideration should avoid any direct implication regarding a concept of crimes of States which was yet to be decided. Furthermore, in the case of crimes of aggression, a State obliged to make reparation for damage caused might not have adequate resources to provide full compensation to the victims of that aggression, having itself suffered grievous economic loss owing to its own action and to the countermeasures taken against it. Any compensation regime should be equitable and reasonable, keeping in view the circumstances and paying capacity of the State responsible.

83. Article 6 incorporated the established obligation to try or extradite. The provision dealing with simultaneous requests from different States for

extradition under the article should not, however, be drafted in a mandatory manner concerning the priority to be given to the principle of territorial jurisdiction. He therefore suggested that in article 6, paragraph 2, the word "shall" should be replaced by "may". Article 6, paragraph 3, could also be redrafted advantageously to emphasize the fact that the obligation to try or extradite should not prejudge or prejudice the jurisdiction of any international criminal court as and when it was established. The current wording appeared to emphasize the establishment of the court, which was a matter of policy on which no final decision had yet been taken.

84. With regard to draft article 7, several States had advocated some relaxation of the rule of non-applicability of statutory limitations. All States, however, had advocated some flexibility with regard to the length of time after which statutory limitations should apply. His delegation believed that, for practical reasons relating to prosecution and the need for sound administration of justice, there must be solid grounds for any decision to make statutory limitations non-applicable in certain cases. The United Kingdom's observation that the suggested rule could hamper attempts at national reconciliation and the amnesty of crimes should not be forgotten. Given that the essential aim of drafting the code and establishing a permanent international criminal court was deterrence and preservation of peace and security, it was also possible to provide for withdrawal of prosecution in the interests of securing that aim.

85. The report proposed little of substance with regard to articles 8, 9 and 10. Article 8, which, as it stood, represented the bare minimum, should include the full range of generally recognized principles, arranged by categories, as established in international or regional instruments. His delegation also wondered whether the rule of specialty should not appear either in article 8 or elsewhere in the draft.

86. Article 9, embodying the fundamental principle of non bis in idem, raised three important questions. First, should a trial in one court prevent trial in another court? Secondly, should a trial in a national court be a bar to trial at an international court? Thirdly, in what circumstances could a trial be regarded as a fake trial? The solution proposed by the Special Rapporteur in paragraphs 3 and 4 of the article adopted at first reading had elicited well-nigh irreconcilable reactions from Governments. The Special Rapporteur stated categorically only that a national court was not competent to hear a case already tried by the international criminal court - a view shared by his delegation, not so much because it believed that allowing a national court to hear such a case could destroy the authority of the international court, but because it considered it desirable to encourage and consolidate the possibility of establishing an international criminal court. In any case, courts at the national level should continue to exercise their jurisdiction until such time as the international criminal court had become fully recognized and effective.

87. The new text did not solve the problem, because the references to ordinary crimes and fake trials themselves raised some complicated questions. In his delegation's view, the reference to ordinary crimes was connected with the

characterization of conduct as a crime under national law, as opposed to its characterization at the international level. Genocide, for example, should not be treated on the same basis as homicide as perceived in internal law; and the characterization of conduct under internal law should not be an obstacle to prosecution at the international level. Consequently, the non bis in idem principle should not be invoked.

88. The problem of fake trials was a real one, and could not be solved by encouraging a multiplicity of trials. In any case, a second trial was only a theoretical possibility, unless it were to take the form of a trial in absentia, a procedure contrary to the concept of respect for the rights of the accused. The principle of retrials should in any case be closely analysed, with proper respect accorded to all legal systems and ideas of justice, irrespective of the cultural, religious and social backgrounds they represented.

89. Article 9, paragraph 2, as adopted on first reading, had suggested that imprisonment was the only valid punishment. His delegation had an open mind on the question whether community work would be an appropriate penalty in the context of serious crimes. The question of the enforcement of penalties required careful consideration.

90. In the light of the considerations noted in paragraph 166 of the ILC report (A/49/10), his delegation supported article 10, on non-retroactivity. With regard to articles 11 to 14, one legitimate view was that the Code should not provide for possible defences and extenuating circumstances in the case of such serious crimes. Any available defences and relevant extenuating circumstances must be specified in the Code, and not left to the discretion of the judges. Moreover, the Commission should deal not only with extenuating circumstances but also with aggravating circumstances. In order to avoid the charge of having drafted the Code in undue haste, it should find the necessary time to group together the various relevant factors mentioned under articles 11, 12 and 13. One easy solution, however, would be to regulate such matters through national jurisdiction - an approach advocated by the Governments of the United Kingdom and Paraguay.

91. The reference to a competent court in the draft article 14 adopted on first reading had not made it clear whether a national or an international criminal court was referred to. That question was not clarified in the new article 15. If a national court was to be competent, then it was fair to assume, as Belarus had suggested, that the crimes should be punished in a manner commensurate with their extreme gravity.

92. The report mentioned various factors that might constitute extenuating circumstances, defences or aggravating circumstances. While it had no objection to treating those factors appropriately, his delegation recommended that wherever it was necessary to repeat the same factor, the scope and manner in which it could be invoked should be specified in the commentary. It was also worth noting that articles 11, 12 and 13 appeared to have no counterpart in the draft statute for an international criminal court or in the Statute of the International Tribunal for the former Yugoslavia. Where the concepts referred

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to in those articles were reflected in the draft statute or the Statute of the International Tribunal, they had been accorded a different emphasis.

93. In article 11, the draft code indicated that an order of a Government or a superior could be pleaded as a defence if it had been impossible for the offender not to comply with that order. In the Statute of the International Tribunal, such a situation was regarded as a mitigating circumstance, but did not confer total exemption from punishment. His delegation favoured the approach adopted in the Statute of the International Tribunal.

94. Article 12 required the superiors to take all "feasible" measures to prevent or repress the crime, whereas the corresponding provision of the Statute of the International Tribunal required "reasonable" measures to be taken. The Statute also provided for the test of knowledge or reason to know as grounds for fixing responsibility of the superior. In his delegation's view, the discrepancy between the tests employed might create confusion. The Commission must make an effort to provide uniform guidance in specifying what tests were involved.

95. Under article 13, the fact that the person committing the crime acted as head of State or Government did not relieve him or her of criminal responsibility. However, the Statute of the International Tribunal had envisaged that factor as a mitigating circumstance for purposes of punishment. Furthermore, it should be noted that, in the view of some Governments, the offender's status as head of Government should actually be regarded as an aggravating circumstance. Once again, there was a need to harmonize the concepts involved; and also to specify the exact consequences for the head of State when crimes on behalf of a State were involved or when they were committed in his or her name. In his delegation's view, the head of State should be able to show, by way of defence, or as extenuating circumstances, that clear instructions had been issued to prevent the commission of the crime, and that they were supported by effective machinery to enforce them. Circumstances rendering the head of State's authority purely notional should also be an extenuating factor.

96. While self-defence, coercion and state of necessity were mentioned as defences in article 14, the Statute of the International Tribunal had no similar provision, and the draft statute for an international criminal court referred to those circumstances only for purposes of determining the gravity of the crime for purposes of punishment. Once again, some of those defences might be treated as mitigating circumstances, rather than regarded as absolving the offender from criminal responsibility.

97. There was also room for further clarification of the factors involved in determining the extenuating circumstances referred to in article 15 on the basis of national practice and criminal law doctrine.

98. While commending the Commission for its important work in developing the draft Code of Crimes, his delegation noted that a number of questions had still to be resolved. He singled out the following: (i) Should there be a code for a

limited number of crimes? (ii) Given the broad range of crimes to be included in the Code, should its title refer only to crimes against "the peace and security of mankind"? (iii) Should the Code be confined to crimes committed by individuals, or should it extend to crimes committed by States? (iv) Was the Code to be implemented through national legal systems, or through an international mechanism? In the latter event, how were punishments to be prescribed and implemented? (v) What was the relationship between the court and the Code? (vi) What should be the status of the Code in the internal law of the States parties to the court? (vii) Should there be a provision on settlement of disputes within the convention containing the Code? His delegation had already offered its views on some of those issues, and was confident that the Commission would complete its consideration of the topic during the term of office of its current members.

99. Mr. AL-BAHARNA (Bahrain) commended the Commission for completing its second reading of the draft articles on the law of the non-navigational uses of international watercourses. At its forty-sixth session, the Commission had considered the second report of the Special Rapporteur, which had, inter alia, proposed the inclusion of "unrelated" confined groundwaters within the scope of the project and the induction of a new article 33 concerning the settlement of disputes.

100. The Special Rapporteur's study on "unrelated" confined groundwaters at the Commission's request had revealed little by way of "hard law" that was of practical use to the Commission. As the Special Rapporteur acknowledged, State practice on the management of groundwater resources had been found to be lacking. Admittedly, the United Nations had exhorted States to carry out studies to explore the potential of groundwater basins and resources; but that did not warrant the inclusion of "unrelated" confined groundwaters in the draft articles in the absence of a thorough understanding of the implications of the subject. His delegation was not opposed to the codification and development of the topic of "unrelated" confined groundwaters. It was not sure, however, whether the topic could be included within the scope of the draft articles, and it thus supported the Commission's decision not to include it.

101. Concerning the settlement of disputes, the Special Rapporteur remained convinced that, at a minimum, a tailored, bare-bones provision on the settlement of disputes was an indispensable component of any convention the Commission would put forward on the current topic; and had thus proposed a new article 33, which advocated consultations and negotiations as a preliminary step, failing which the parties could have recourse to fact-finding or conciliation, followed by arbitration or adjudication accepted by all the parties to the dispute. During its forty-sixth session the Commission had refined those proposals and had adopted article 33. That article, which followed the now well-established United Nations practice of including fact-finding procedures and a consensual compromissory clause, was acceptable to his delegation.

102. The draft articles on international watercourses adopted by the Commission on second reading constituted a turning-point in its work, codifying pre-existing law while progressively developing it. They offered the best

possible norms for regulating the several uses of water in international watercourses, and for keeping the waters free from pollution - a daunting challenge in the light of estimated urban water needs in the year 2000.

103. It should be stressed that the draft articles sought to resolve the conflict of interests of all basin States in the use of waters by reference to the principle of equitable and reasonable utilization. All watercourse States were obliged to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States, and procedural rules were laid down governing the substantive rights of those States. Remedies were prescribed for redressing grievances and resolving disputes. The draft articles thus contained a set of balanced provisions suitable for a framework convention. Watercourse States now had a set of international norms that could be adapted to the individual requirements of a particular international watercourse. His delegation commended them to all States, and would support a resolution for the adoption of a convention on the law of the non-navigational uses of international watercourses by the General Assembly or by an international conference of plenipotentiaries.

104. Turning to the topic of State responsibility, he said that his delegation was gratified to receive the assurance that the Commission would be able to conclude on time its first reading of the draft articles on State responsibility. It urged the Commission to give high priority to that item, which had been on its agenda for too long.

105. On the question of the consequences of crimes vis-à-vis State responsibility, the central question was whether or not the draft articles on State responsibility should deal with the consequences of crimes of States, as stated in article 19 of Part One. Article 19 left much to be desired from the conceptual point of view. It was somewhat imprecise to treat international delicts and international crimes together, given the differences in their nature and their effects. While an international delict entailed bilateral or multilateral breaches of international obligations, an international crime was a breach of obligations erga omnes causing injuries of physical and mental nature to people at large. It was true that the concept of crimes of States was not fully developed. But history testified to crimes committed by States: aggression, genocide and apartheid were examples of such crimes. If in a given instance those crimes were acts committed by individuals, and not by States qua States, then the question of responsibility of a State arose, as had been postulated by article 5 of the draft Code of Crimes against the Peace and Security of Mankind. In either case, there could be State responsibility for international crimes.

106. In his fifth report, the Special Rapporteur had examined the question whether the United Nations organs were empowered to determine the existence, attribution and consequences of wrongful acts contemplated in article 19, and whether the existing powers of the United Nations organs should be adapted to those specific tasks. The reactions of members of the Commission to those questions had varied. With regard to the first question, his delegation wished to say that the United Nations could not, like nation States, impose sanctions

in respect of international crimes. The enforcement action contemplated by Chapter VII of the Charter was specifically geared to the objectives of its Article 39. It was not possible to assert categorically that Chapter VII operated as a sanction mechanism in international relations. With regard to the question of adapting the powers of the United Nations organs, he doubted whether such a course was possible in the prevailing world political and economic conditions. Any attempt at so adapting them would in any case involve a study of the primary rules of international law. It could be objected that, in engaging in such an inquiry, the Commission would be transgressing its mandate.

107. Notwithstanding those misgivings and caveats, situations had arisen resulting in aggression, genocide and apartheid, in which the Security Council had been compelled to act as a mechanism of sanction. Ways and means should be found of articulating norms regulating the consequences of those heinous international crimes from the point of view of State responsibility. It would, however, need to exercise care in specifying both the substantive and the procedural rules with regard to the legal regulation of the crimes concerned. As those crimes provoked differing reactions within the community of States, they should be dealt with separately, under different articles.

108. Turning to the item "International liability for injurious consequences arising out of acts not prohibited by international law", he noted that the report referred to the special situation of the developing countries and the role of international organizations with regard to the proposed legal regime of prevention. Bahrain believed that the developing countries were at a disadvantage in assessing or monitoring activities involving a risk of transboundary harm, and would welcome an article on developing countries in the general provisions so long as it adequately safeguarded their interests. The Commission should also explore the possibility of giving a positive role to international organizations in the proposed legal regime.

109. The general debate in the Commission had underlined the importance of adopting expeditiously a set of articles on the legal regime of prevention. His delegation agreed that there was sufficient legal basis in State practice for the articles on the proposed legal regime. Of the articles approved by the Commission during its forty-sixth session, article 1 was probably the most important. The draft articles applied only to activities which involved a risk of causing significant transboundary harm. The definition of "risk of causing significant transboundary harm" contained in article 2, paragraph (a), provided a workable yardstick for understanding the term. The subjective element might not be altogether eliminated, but it was to be hoped that the States concerned would interpret article 2 (a) in such a way as not to subvert the regime being established.

110. Regarding article 12, it appeared that the prevailing view in the Commission was to leave the specifics of what ought to be the content of assessment to the domestic laws of the State conducting such assessment. Article 14 on measures to prevent and minimize the risk had an important function in the regime of prevention. It required States to take all measures - legislative, administrative and others - for the purpose of preventing or

minimizing the risk of transboundary harm. The standard of obligation with regard to prevention was "due diligence", a well-recognized principle of international law. His delegation supported article 16 bis and its underlying democratic principle.

111. With regard to article 17, his delegation supported fully the exemption on the grounds of national security, but would like the Commission to explore further whether the ground of industrial secrets should be retained and if so, under what conditions. Article 18 on consultations on preventive measures was without doubt one of the most important preventive measures contemplated, and appeared generally fair and equitable. Article 20, specifying or enumerating the factors involved in an equitable balance of interests, would be of practical assistance to States involved in activities causing a risk of transboundary harm; therefore, his delegation had no hesitation in supporting it.

112. The articles, on the whole, were balanced and conformed to general principles of international law and new trends in United Nations practice. The Commission deserved commendation for producing a set of well-drafted articles on prevention.

ANNOUNCEMENT CONCERNING SPONSORSHIP OF DRAFT RESOLUTIONS

113. The CHAIRMAN announced that Armenia, Australia, Belize, Cameroon, Chile, Costa Rica, Georgia, Guatemala, Latvia, Lebanon, Micronesia (Federated States of), Mongolia, Nicaragua, Nigeria, Papua New Guinea, Republic of Moldova, Romania, Turkey and Venezuela had become sponsors of draft resolution A/C.6/49/L.3 submitted under agenda item 140.

The meeting rose at 6.30 p.m.